SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 325

MORLEY CONSTRUCTION COMPANY ET AL.,
PETITIONERS,

vs.

MARYLAND CASUALTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a] [Captions omitted]

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[fol. 1]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

AMENDED BILL OF COMPLAINT—Filed March 3, 1934

Now comes the plaintiff and for its cause of action against the defendants states:

1. That the plaintiff is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of and a citizen and resident of the State of Maryland, engaged in the general business of writing casualty and surety insurance, and licensed to do business in the State of Missouri.

2. That defendant Morley Construction Company is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Missouri, and a citizen and resident of the State of Missouri, and engaged in the State of Missouri and elsewhere in the general contracting business, with its principal office in Kansas City, Missouri. That defendant Merchants Bank of Kansas City, Missouri, is a corporation duly organized under the laws of the State of Missouri, and a citizen and resident of the State of Missouri, with its principal office and place of business in Kansas City, Missouri, engaged in the general banking business. That the cause of action herein alleged is a petition in equity affecting property in Kansas City, Missouri, involving corporations of Missouri located and doing business in Kansas City, Missouri, and in the Western District of Missouri, and within the jurisdiction of this Court, and that this action is one of a civil nature involving exclusive of interest a sum in excess of the sum of Three Thousand Dollars ($3,000.00). That every issue of law and fact herein is wholly between citizens of different states, to-wit, plaintiff a citizen and resident of the [fol. 2] State of Maryland, and the defendant citizens and residents of the State of Missouri.

Plaintiff for its cause of action against the defendants, and each of them, states that plaintiff as heretofore stated is engaged in the business in the State of Missouri and in every state in the United States, of writing among other things surety bonds for others for hire, and that the defendant Morley Construction Company is a corporation as heretofore stated and engaged in the general contracting business in the State of Missouri and elsewhere in the United States. That the defendant Merchants Bank of Kansas City, Missouri is a corporation organized under the general banking laws of the State of Missouri, and as such is operating a state bank in Kansas City, Missouri, and is the depository or bank in which the defendant Morley Construction Company carries its account and in which was deposited the funds as hereinafter stated.

3. Plaintiff states that on or about July 28, 1932, the defendant Morley Construction Company entered into a written contract with the Veterans Administration Department of the United States of America under which said defendant agreed to furnish all labor and material for and to fully construct and complete a veterans hospital in or near the city of Batavia, New York, at and for the sum of Five Hundred and Forty Thousand Three Hundred Dollars ($540,300.00), in accordance with the contract therefor and in accordance with the plans and specifications therefor.

4. That on or about the 28th day of July, 1932, the defendant Morley Construction Company made application to the plaintiff herein to procure the plaintiff herein to execute, as surety for defendant Morley Construction Company a bond to the Veterans Administration Department of the United States of America in the penalty of Two Hundred Seventy-five Thousand Dollars ($275,000.00), conditioned upon the completion of said contract and the payment of all bills for labor and material, and state that pursuant to such application and in consideration of the obligations therein assumed by such applicant, and in consideration of the bond premium paid and to be paid, plaintiff did execute as surety for defendant Morley Construction Company as principal a bond to the Veterans Administration Department of the United States of America, conditioned upon the completion by defendant Morley Construc-

tion Company of the building and/or building and improvements contracted to be erected and constructed as provided in said contract, and conditioned upon the payment by defendant Morley Construction Company of all bills for labor [fol. 3] and material used or consumed in the construction of said building.

5. Plaintiff states that defendant Morley Construction Company entered upon the performance of said contract and proceeded therewith until on or about the 27th day of April, 1933, at which time defendant Morley Construction Company became involved in financial difficulties and became involved in disputes and controveries with laborers and other persons performing labor and furnishing material upon said job and notified the plaintiff, surety upon said bond for said contract, that it was unable to proceed with the construction of said building unless the plaintiff would furnish to defendant Morley Construction Company advances or money for the purpose of completing said work.

6. Thereafter and on the 28th day of April, 1933, the plaintiff and defendant Morley Construction Company entered into a supplemental contract in order that the construction and erection of the buildings covered by said contract might proceed and be completed, and under and by virtue of which the plaintiff agreed to and did deposit with the M & T Trust Company in the City of Buffalo, New York, to the account of Morley Construction Company the sum of Five Thousand Dollars ($5,000.00), and coincident therewith Morley Construction Company deposited in said M & T Trust Company the sum of Five Thousand Dollars ($5,000.00), both of such deposits to be used towards the completion of said contract and to be disbursed for such purpose under the joint control of defendant Morley Construction Company and the plaintiff, Maryland Casualty Company, and in which said contract defendant Morley Construction Company agreed to deposit in said account in said M & T Trust Company all estimates and moneys received thereafter from the United States Government or from said Veterans Administration Department because of said work, all to be subject as heretofore stated to the joint control of plaintiff and Morley Construction Company towards the completion of said work.

That by said contract defendant Morley Construction Company agreed that out of the proceeds of said job if sufficient there be, there should be repaid to the Maryland Casualty Company the sum of Five Thousand Dollars ($5,000.00) so advanced by it, and agreed that if such proceeds were not sufficient for such purpose that said Morley Construction Company would pay back the amount so advanced by the plaintiff. By said contract plaintiff further agreed to place in said account subject to the limitations hereinbefore stated a sufficient sum of money to pay off all plasterers' claims unpaid and sufficient money to com-
[fol. 4] plete the plastering contract, and defendant Morley Construction Company agreed to repay to the plaintiff all moneys so advanced to them for this purpose, and plaintiff states that pursuant to said contract it has deposited in said account or paid out on account of such claims and for such work an additional sum of Five Thousand Seven Hundred Dollars ($5,700.00), making a total of Ten Thousand Seven Hundred Dollars ($10,700.00), heretofore advanced by the plaintiff as such surety in the completion of said work. Plaintiff states that a copy of said supplemental agreement is hereto attached and marked Exhibit A.

7. Plaintiff states that upon the execution of said supplemental agreement defendant Morley Construction Company acting by and through its president, H. F. Morley, notified the said Veterans Administration Department of the United States of America to thereafter send to said M & T Trust Company at Buffalo, New York, all estimates or all money due on estimates or on said contract thereafter to the said M & T Trust Company for deposit to the account of defendant Morley Construction Company under the terms of said supplemental agreement.

Plaintiff further states that thereafter the said Veterans Administration Department in accordance with the terms of said supplemental contract forwarded each estimate or amount due on each estimate, except the check or voucher for the final estimate and retent, to the said M & T Trust Company for deposit in accordance with said supplemental contract and such amounts were so deposited in said trust company and disbursed in accordance with said supplemental agreement.

8. Plaintiff states that after the execution of said supplemental agreement, defendant Morley Construction Com-

pany proceeded with the completion of said contract and did complete the erection and construction of said buildings or improvements, whereupon there became due and payable under the terms of said contract a final estimate and the return or payment of the accumulated amount of retained percentage which had been held by the said Veterans Administration Department, in all amounting to the sum of Fifty-nine Thousand Seven Hundred Eighty and 82/100 Dollars ($59,780.82), which under the terms of said supplemental contract and direction to said Veterans Administration Department should have been sent and forwarded to said M & T Trust Company for deposit in accordance with said supplemental contract.

9. Plaintiff states that said Veterans Administration Department in accordance with said original contract issued [fol. 5] its check or warrant in the usual form upon the United States Treasury, dated November 13, 1933, and being warrant No. 2213155, and payable to the order of Morley Construction Company for the amount of Fifty-nine Thousand Seven Hundred Eighty and 82/100 Dollars ($59,780.82). Plaintiff states that upon the issue of said warrant the said Veterans Administration Department or some employee or official therein through mistake, negligence or inadvertence sent said warrant direct to defendant Morley Construction Company in Kansas City, Missouri, instead of sending the same in accordance with said supplemental agreement and said notice to it to said M & T Trust Company, and defendant Morley Construction Company endorsed and delivered said check to defendant Merchants Bank of Kansas City, Missouri, and procured said Merchants Bank to issue a cashier's check for the amount of said warrant, $59,780.82, payable to Herbert F. Morley, president of defendant Morley Construction Company, Trustee; that after issuing such cashier's check caused such warrant to be deposited in the Federal Reserve Bank, at Kansas City, in the usual course for collection and said warrant was in due course forwarded to the Treasury of the United States for payment, and in the meantime defendant Merchants Bank held said cashier's check, without delivery, to be delivered upon payment of said warrant.

10. Plaintiff states that upon receiving information from the said Veterans Administration Department that it

had by mistake sent said warrant direct to defendant Morley Construction Company and not to said M & T. Trust Company as provided by said contract and by said direction, the plaintiff demanded of defendant Morley Construction Company that it immediately send the amount of the proceeds of said warrant so converted by it to its own use to the said M. & T. Trust Company to be deposited and disbursed in accordance with said supplementary agreement, and plaintiff states that the defendant Morley Construction Company has failed and refused to so transmit said money to said M. & T. Trust Company as provided by said contract and by its said written direction to the said Veterans Administration Department, and still refuses so to do.

11. Plaintiff states that thereafter it learned that said warrant had not been paid by the Treasurer of the United States, wherefore plaintiff instituted a proceeding in the District Court of the District of Columbia to stop the payment of said warrant and procured from said Court an order temporarily stopping the payment of said warrant, which order is still in effect, and under said warrant is [fol. 6] being held unpaid pending the disposition of said temporary order.

12. Plaintiff states as hereinbefore set out that it has to this date as surety as herein described, advanced for and paid bills for labor and material entering into the construction of said Veterans Hospital in the amount of Ten Thousand Seven Hundred Dollars ($10,700.00), and plaintiff further states that there are now outstanding bills or claims for labor and material against said Veterans Hospital job and for which plaintiff will be responsible under its bond in approximately the sum of One Hundred and Two Thousand Dollars ($102,000.00), and states that there remains in the said deposit in said M. & T. Trust Company under the terms of said supplemental agreement the sum of only approximately Seven Thousand Dollars ($7,000.00).

13. Plaintiff states that under and by virtue of the terms of said supplemental agreement it became and is entitled to have said money so received by defendant Morley Construction Company sent to the said M. & T. Trust Com-

pany for deposit and disbursement in accordance with the terms of said supplemental contract.

14. Plaintiff further states that as surety upon the bond of defendant Morley Construction Company for the completion of said contract and for the payment of all bills for labor and material entering therein, it became upon the payment and advancement of said Ten Thousand Seven Hundred Dollars ($10,700.00) subrogated to the extent of such payment to the estimates or moneys thereafter due from the said Veterans Administration Department upon said construction contract.

15. Plaintiff further states that it is the primary duty and obligation under the laws obtaining of defendant Morley Construction Company to pay off and discharge all outstanding bills for labor and material performed or used in the construction of said improvements and to indemnify and to save the plaintiff harmless from any loss or damage on account thereof, and states that there are now due and unpaid as heretofore stated on account of bills for such labor and material the sum of One Hundred and Seven Thousand Dollars ($107,000.00), and states that it is the duty and obligation of defendant Morley Construction Company to exonerate this plaintiff from the payment thereof and to pay the same, and that the plaintiff is entitled to have used for that purpose and applied thereon the said sum of Fifty-nine Thousand Seven Hundred Eighty and 82/100 Dollars ($59,780.82) so improperly received by defendant Morley Construction Company and improperly and [fol. 7] illegally applied and converted to its own use as hereinbefore stated.

16. Plaintiff further states that in view of the financial condition of the Morley Construction Company as hereinafter stated and under and by virtue of said supplementary agreement, it is entitled to have a specific performance of said supplementary agreement and to have defendant Morley Construction Company ordered and required to forward said sum of $59,780.82 so improperly received by it to said M. & T. Trust Company in accordance with the terms of said supplementary agreement.

17. Plaintiff further states that defendant Morley Construction Company is involved in other financial complica-

tions and states that defendant Morley Construction Company is wholly insolvent.

18. Plaintiff further states that it is entitled to have the money so deposited with defendant Merchants Bank of Kansas City, Missouri, and represented by said Government Warrant, impressed with a lien and impressed with a trust so that the same may be disbursed and used as required by the terms of said supplemental contract and as plaintiff is entitled to have it disbursed in accordance with its right of subrogation, and states that unless a lien is established thereon and/or the same is impressed with a trust for the purposes hereinbefore stated, the defendant Morley Construction Company will or can withdraw said money and use the same for its own purposes or for purposes beyond the purposes as set out in said supplementary contract, or conceal the same so that the said funds will not be available for the purposes for which under the terms of said contract and under the obligation of said Morley Construction Company the same should be used, and plaintiff has good reason to believe and does believe that defendant Morley Construction Company, unless restrained, will so convert or conceal such funds, and that unless the said funds are so impressed with a trust or lien, and unless the defendant Morley Construction Company and its officers, servants and agents are restrained and enjoined from withdrawing or disbursing said money or any part thereof for any purpose other than that covered by said supplemental agreement, and unless said defendant Merchants Bank of Kansas City, Missouri, is restrained from permitting the withdrawal of said funds or any part thereof for any purpose other than that set out in said supplementary agreement, this plaintiff will suffer an irreparable loss, and states that the plaintiff has no adequate remedy at law for any relief in the premises.

[fol. 8] Wherefore, plaintiff prays the Court by its order to restrain and enjoin defendant Morley Construction Company, its officers, agents and employees from withdrawing or disbursing any of the said sum of $59,780.82 so deposited with defendant Merchants Bank of Kansas City, Missouri, and represented by said Government Warrant, until the further order of this Court, and that this Court by its or-

der and decree fix and establish a lien and impress a trust upon said fund for the purpose and to the end that the same be used and disbursed in accordance with the terms of said supplementary agreement and such rights of subrogation as the Court may determine the plaintiff has in the premises, and that the Court by its order exonerate the plaintiff from the payment under said bond until the said funds shall have been used and applied in accordance with the terms of said supplementary contract and in payment for the outstanding bills for labor and material performed and used in the construction of improvements under said construction contract, and that the Court by its order and decree direct and require defendant Morley Construction Company to authorize and direct the Treasurer of the United States and/or the Veterans Administration Department of the United States to turn over said warrant to the Clerk of this Court to be transmitted by said Clerk to the said M & T Trust Company in accordance with the terms of said supplementary contract, and that the Court by its order and decree direct and require defendant Morley Construction Company to exonerate this plaintiff from the payment of any bills for labor and material due or to become due on account of the construction of said improvements, and to pay off and discharge any and all of such bills and to protect and to save plaintiff harmless on account thereof, and that defendant Merchants Bank of Kansas City, Missouri, be ordered and directed to release any apparent right it may have to said warrant and to require and order said Merchants Bank to authorize and direct the Treasurer of the United States and/or said Veterans Administration Department to turn over and deliver said warrant to the Clerk of this Court, and that pending the hearing of this case the Court issue a restraining order restraining and enjoining defendant Morley Construction Company from withdrawing or disbursing any of said funds so deposited with defendant Merchants Bank of Kansas City, Missouri, and that defendant Merchants Bank of Kansas City, Missouri, be restrained and enjoined from permitting the withdrawal or disbursement of such funds pending the hearing of this action, and that the Clerk of this Court upon receipt of said warrant be directed to send the same to said M & T Trust Company for deposit in accordance with said agreement

[fol. 9] of April 28, 1933, and for such other and further relief as to the Court may seem just and proper in the premises.

Spencer F. Harris, Paul G. Koontz, Attorneys for Plaintiff.

Duly sworn to by Spencer F. Harris. Jurat omitted in printing.

Received copy of the foregoing Amended Complaint together with the Exhibits attached this 3 day of March, 1934.
Buchholz & O'Donnell, Attys. for Defts.

EXHIBIT "A" TO AMENDED COMPLAINT

Agreement

Whereas the Morley Construction Company of Kansas City, Missouri is the General Contractor under a contract with the United States Government for the construction of the Veterans' Administration Hospital at Batavia, New York, said contract bearing date of July 23, 1932 and

[fol. 10] Whereas the Maryland Casualty Company executed a bond bearing date of August 1, 1932, wherein and whereby said Maryland Casualty Company guaranteed the faithful performance of the above mentioned contract and

Whereas the Morley Construction Company has encountered financial difficulties in the construction of said Veterans' Administration Hospital and has called upon the Maryland Casualty Company for financial assistance in regard to the completion of said contract in accordance with a letter to the Maryland Casualty Company from the Morley Construction Company bearing date of April 27, a copy of which is hereto attached and made a part of this instrument, in consideration of the mutual promises of the parties hereto it is mutually agreed as follows:

First. The Morley Construction Company hereby agrees to deposit at the M & T Trust Company in the City of Buffalo, New York, the sum of Five Thousand ($5,000.00) Dollars and to deposit from time to time certain other sums of money to be used toward the completion of said

contract. The Morley Construction Company further agrees to deposit in said account for the benefit of said contract all moneys and estimates received from the United States Government because of said work.

Second. The Maryland Casualty Company hereby agrees to deposit in said M & T Trust Company to the account of the Morley Construction Company the sum of Five Thousand ($5,000.00) Dollars.

Third. It is mutually understood and agreed that the said Maryland Casualty Company shall have joint control of all moneys deposited in said account and that no check, draft or withdrawal order shall be drawn on said account and paid by said bank without the approval of the said Maryland Casualty Company by its representatives, James F. Kelly and/or Martin C. Schaus, said approval to be designated on said check, draft or withdrawal order by the initials of the above individuals, to-wit, J. F. K. and/or M. C. S.

Fourth. The Morley Construction Company hereby agrees to pay back to the Maryland Casualty Company the aforementioned sum of Five Thousand ($5,000.00) Dollars out of the proceeds of said job if there be sufficient money and if not, they thereby bind themselves and agree to pay said money themselves to the Maryland Casualty Company.

Fifth. The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plaster-[fol. 11] ers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient money to complete the Giamberardino plastering contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory.

Sixth. The Morley Construction Company hereby agrees to pay to the Maryland Casualty Company any and all moneys advanced to them for payment of plasterers' claims or other laborers' claims on the D. Giamberardino & Sons contract and any and all moneys advanced by the said Maryland Casualty Company to assist in the completion of the D. Giamberardino & Sons contract.

Seventh. The Morley Construction Company hereby agrees to give a note in the sum of Five Thousand

($5,000.00) Dollars bearing even date of this instrument to the Maryland Casualty Company as security to them for the payment of the sum of Five Thousand ($5,000.00) Dollars mentioned in Paragraphs Second and Fourth in this instrument.

Dated April 28, 1933.

Morley Construction Company, by H. F. Morley, President. Maryland Casualty Company, by James F. Kelly.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

On this 28th day of April, 1933 before me personally came H. F. Morley, to me known, who, being by me duly sworn, did depose and say that he is the president of the Morley Construction Company, the company described in and which executed the foregoing instrument; that he has the authority to sign such instruments and that he affixed his signature thereto by such authority.

William H. Robinson, Notary Public in and for the County of Erie, New York.

EXHIBIT "B" TO AMENDED COMPLAINT

April 27th, 1933.

Maryland Casualty Company, Baltimore, Maryland.

GENTLEMEN:

As you have been heretofore informed, the work on the Veterans' Administration Hospital at Batavia, New York [fol. 12] has been stopped by reason of labor difficulties encountered by Sub-Contractor D. Giamberardino & Sons.

It is claimed by the laborers that they have not been paid since March 9, 1933. These unpaid claims amount to about $7,500.00. In addition to this there are some disputed bills, the laborers claiming that they have not received the full prevailing wage although they have signed receipts for the full amounts. These claims aggregate approximately $5,000.00. This is as the situation now appears.

The work on the plastering contract is at a stand-still and this letter is to inform you that the Morley Construc-

tion Company, because of the situation on the plastering contract over which they have no control and because of their general financial situation, cannot proceed with the work without some financial assistance. We propose that the Maryland Casualty Company advance to us sufficient money to meet the unpaid plasterers' and laborers' bills as stated above—that is, $7,500.00—and in addition to that sufficient money to meet the disputed bills that we have receipts for if this is necessary to get the men back to work. We estimate that the cost to complete the plastering contract will be approximately $19,550.00. This figure does not include the unpaid plasterers' and laborers' claims as stated above. There is still owing on this contract the sum of $13,500.00, leaving a balance of $6,050.00 to complete the plastering contract on which figure we need financial assistance.

We agree to give the Maryland Casualty Company a demand note payable one year from date for the moneys advanced and, as an additional security, to assign any right which we may have against the National Surety Company, the bonder of D. Giamberardino & Sons, plaster contractor, up to the amount of the indebtedness and will render every assistance necessary to prosecute suit against the National Surety Company or any other corporation or individual against which we have a right of action.

In the event that the financial assistance as stated above is given to us we have the assurance that our bank will advance us sufficient money to complete the job according to our contract and pay all outstanding indebtedness on this job.

We wish to urge upon you at this time the necessity of prompt action in this matter. The labor condition is a serious one and the Government is demanding immediate action. The facts contained in this communication are substantially true and are set out for the purpose of inducing [fol. 13] the Maryland Casualty Company to advance moneys and credits to us as stated above.

Very truly yours, —— ——.

Copy.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JOINT AND SEPARATE MOTION TO DISMISS, ANSWER AND COUNTER-CLAIM—Filed January 5, 1934; Refiled September 27, 1934

1. Now come the defendants, and each of them, and pray the court to dismiss plaintiff's Bill of Complaint herein, for the reason that the said Complaint in Equity fails to state facts sufficient to constitute a cause of action or basis for relief against the defendants, or either of them.

2. Defendants, and each of them, state that heretofore defendant Morley Construction Company received a check numbered 2,213,115, dated November 13, 1933, for Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars, drawn on the Treasurer of the United States, by J. B. Scommer, Disbursing Clerk, Veterans Administration, Symbol 11-500, to the order of Morley Construction Company; that said check was not deposited in the account of the defendant Morley Construction Company with the defendant Merchants Bank of Kansas City, Missouri, but was deposited by its President, Herbert F. Morley, with the defendant Merchants Bank of Kansas City, Missouri, on the 22d day of November, 1933, for collection, at which time it was agreed by the said defendant Merchants Bank that when collected said sum would be credited to Herbert F. Morley, as Trustee, and a Cashier's Check delivered to said Herbert F. Morley, as Trustee, for said sum; that after said deposit was made, said defendant Merchants Bank forwarded said check through the usual channels for collection to the Treasurer of the United States and deposited same in its account with the Federal Reserve Bank, of Kansas City, Missouri; that thereafter, and before the said check was paid by the Treasurer of the United States, the plaintiff herein filed a Bill of Complaint for Injunction and Rule to Show Cause, on the 25th day of November, 1933, in the Supreme Court of the District of Columbia Holding an Equity Court, alleging, in substance the same matters and things against the defendant Morley Construction Company, which were alleged in the Bill of Complaint herein, and alleging that the said check had not yet been paid by the Treasurer of the United States, a copy of said "Bill of Complaint for Injunction,

[fol. 14] and Rule to show Cause," and the Marshal's Return thereto, is hereto attached and marked Exhibit "A".

That thereupon, the Treasurer of the United States refused to honor the said check, or to pay the same until the said suit so pending in the said District Court was disposed of, and that thereafter the defendant Merchants Bank of Kansas City, Missouri, received from the Federal Reserve Bank, of Kansas City, Missouri, a notice advising said Merchants Bank that the said Federal Reserve Bank was in receipt of a letter from the Treasurer of the United States advising that injunction proceedings had been filed by the plaintiff against defendant Morley Construction Company, and the Treasurer of the United States, in the Supreme Court of the District of Columbia, Holding an Equity Court, Equity Case No. 56486, and that final payment of said check is deferred until the rights of all parties can be determined; that a copy of said notice is hereto attached, and marked Exhibit "B".

That for said reasons the defendant Merchants Bank of Kansas City, Missouri, has not, and cannot, collect the amount due on the said check to the defendant Morley Construction Company, and that the defendant Morley Construction Company cannot receive the amount due on the said check for any purpose and that notwithstanding the pendency of the said suit in the District of Columbia and notwithstanding the said proceedings in the said court the plaintiff herein well knowing that it had by the said proceedings in the said Supreme Court of the District of Columbia, rendered it impossible for the Merchants Bank of Kansas City, Missouri, or the Morley Construction Company, to receive the said money, or to use it for any purpose, filed this suit in this court praying for relief, which it knew this court was without jurisdiction to grant, to prevent acts upon the part of the defendants which it knew the defendants were powerless to perform and that for said reason the plaintiff has prayed this court to grant the relief which its own acts have rendered unnecessary and that a decree granting the said defendant the relief it seeks would be futile and that for said reason this court is without jurisdiction to do a vain thing by granting the relief prayed for by the plaintiff.

3. Defendants admit the allegations contained in paragraph numbered 1 of the Complaint in Equity.

4. Defendants specifically deny the allegation in paragraph 2 of the Complaint "That the cause of action herein alleged is a petition in equity affecting property in Kansas City, Missouri, and in the Western District of Missouri" and specifically deny that the funds referred to in the [fol. 15] Complaint were deposited in the account of the defendant Morley Construction Company. Said defendants admit the other allegations set forth in said paragraph numbered 2 of the Complaint.

5. Defendants admit that defendant Morley Construction Company on the 27th day of April, 1933, gave to the said plaintiff the information contained in the last exhibit attached to the Bill of Complaint and that it became involved in the difficulties and disputes referred to in the said exhibit and specifically deny the allegations set forth in said paragraph numbered 5 of the Bill of Complaint, except as above admitted. And defendants state that plaintiff prepared Exhibit "A", attached to the Bill of Complaint, and also the letter of proposal by the defendant Morley Construction Company to the plaintiff, dated April 27, 1933, attached to the Bill of Complaint, and that said instruments were signed by Herbert F. Morley, acting as President of the Morley Construction Company.

6. Defendants admit that the Morley Construction Company entered into the contract referred to in paragraph numbered 6 of the Complaint, and admit that the said contract was entered into in order that the construction and completion of the buildings covered by said contract might proceed and be completed and admit that plaintiff and defendant Morley Construction Company deposited Five Thousand ($5,000.00) Dollars each to the account of Morley Construction Company with M & T Trust Company, and that said deposits were to be used towards the completion of said buildings and to be disbursed for said purpose under the joint control as alleged, and defendants deny that Morley Construction Company made or entered into any contract with the said plaintiff as to moneys or estimates to be deposited, save and except as specifically stated in said Exhibit and defendants admit the allegation that plaintiff further agreed to place in said account a sum sufficient to pay off all plasterers' claims unpaid and sufficient money to complete the plastering contract.

Said defendants further state that the plaintiff failed to comply with the said contract and allege that notwithstanding the sum of Thirteen Thousand Five Hundred ($13,500.00) Dollars was necessary to complete the plastering contract and that said sum was deemed reasonable and satisfactory and that plaintiff agreed to deposit said sum in said account to complete said plastering contract, yet the said plaintiff refused to deposit more than Fifty-seven Hundred ($5,700.00) Dollars and declined to deposit the Seventy-eight Hundred ($7,800.00) Dollars, additional, which the said plaintiff had contracted and agreed to deposit in said account.

[fol. 16] Defendants admit that the plaintiff deposited in said account a total of Ten Thousand Seven Hundred ($10,700.00) Dollars, but states that said sum was Seventy-eight Hundred ($7,800.00) Dollars less than the said plaintiff had so promised and agreed to deposit, and said plaintiff thereby breached said contract and thereby forfeited all rights thereunder.

7. These defendants deny that the defendant Morley Construction Company notified the Veterans Administration Department of the United States of America, to thereafter send to said M & T Trust Company, at Buffalo, New York, all estimates or money due on estimates or on the contract referred to in paragraph numbered 7 of its Bill of Complaint, for deposit to the account of the defendant Morley Construction Company under the terms of said supplemental agreement, and allege that defendant Morley Construction Company notified said Veterans Administration Bureau, Construction Division, as follows:

"Morley Construction Co., Batavia, N. Y.

April 28, 1933.

United States Veterans' Administration, Construction Division, Arlington Building, Washington, D. C.

GENTLEMEN:

In the payment of future estimate checks to the Morley Construction Company on the U. S. Veterans Hospital at Batavia, New York it is hereby requested that you forward checks to the Morley Construction Company, c/o Manu-

facturers and Traders Trust Company, Buffalo, New York, attention Edward W. Miller, Vice President.

Will you kindly acknowledge receipt of this communication and advise if this arrangement will be satisfactory to you?

Very truly yours, Morley Construction Company,
(S.) by H. F. Morley, President.

BDM:HS."

Defendants admit that the United States Veterans Administration, Construction Division, forwarded all the estimate checks excepting two thereafter issued by the Gov- [fol. 17] ernment to the said M & T Trust Company, of Buffalo, New York, for deposit, but denies that the amount so deposited in said trust company was disbursed in accordance with said supplemental agreement, but on the contrary the sum of Seventy-nine Hundred ($7,900.00) Dollars on deposit in said account and the said M & T Trust Company has failed and refused to give to the defendant Morley Construction Company its cancelled checks or a statement of the said account and has failed to discharge the function and duty contemplated by the said agreement with reference to said account.

8. Defendants admit that defendant Morley Construction Company completed and carried out its contract with the Government of the United States and with the plaintiff and did complete the erection and construction of the said buildings and improvements and that on or about the 19th day of July, 1933, the same were accepted by the United States Government, and a final settlement made by and between the defendant Morley Construction Company and the Government of the United States, about November 1, 1933, pursuant to which final settlement the sum of Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,-780.22) Dollars became due and payable to the defendant Morley Construction Company, but the defendants deny that said sum, under the said supplemental contract and direction to the United States Veterans Department should be forwarded to the M & T Trust Company for deposit, and that said supplemental contract did not require that it should be so forwarded.

9. Defendants deny that the said United States Veterans Administration, in accordance with said original con-

tract issued its check or warrant in the usual form upon the United States Treasury, dated November 13, 1933, and being warrant numbered 2,213,155, and payable to the order of the Morley Construction Company for the amount of Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars, but the said defendants state that on the 13th day of November, 1933, issued its check, same being numbered 2,213,115, directed to the Treasurer of the United States, payable to the order of Morley Construction Company for the sum of Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars.

Said defendants state that upon the issuance of said check, neither the said United States Veterans Administration, Construction division, or any employee or official thereof, through mistake, negligence or inadvertence, sent said check direct to defendant Morley Construction Company, in Kansas City, Missouri, instead of sending the [fol. 18] same in accordance with said supplemental agreement and said notice to the said M & T Trust Company, but on the contrary, the said check was intentionally sent by the said United States Veterans Administration, and its employees and officials, to the Morley Construction Company, in the discharge of their official duties.

Defendants specifically deny that the Morley Construction Company deposited said sum in its account with the defendant Merchants Bank of Kansas City, Missouri, subject to its own check.

10. Defendants state that they have no knowledge as to whether or not the plaintiff received information from the United States Veterans Administration, Construction Division, that it had by mistake sent said warrant direct to defendant Morley Construction Company, and therefore deny said allegation and defendants deny that said check was sent to defendant Morley Construction Company by mistake.

Defendants further deny that plaintiff demanded of defendant Morley Construction Company that it immediately sent the amount of the proceeds of said warrant to the said M & T Trust Company to be deposited and disbursed in accordance with said supplemental agreement, but on the contrary the defendants state that the plaintiff demanded of and from the said defendants that the said check be transferred and delivered to the plaintiff and in this con-

nection the defendants say that said M & T Trust Company has failed to account to the defendant Morley Construction Company for the moneys amounting to Seventy-nine Hundred ($7,900.00) Dollars now deposited with said M & T Trust Company, at Buffalo, New York, and that the said M & T Trust Company, for said reason, can not longer act as a depository of any funds of the said defendant Morley Construction Company, and has failed and refused to give said defendant a statement of its account, or its cancelled checks.

11. Defendants deny that the plaintiff, as surety, advanced for unpaid bills for labor and material entering into the construction of the said Veterans Hospital, in the sum of Ten Thousand Seven Hundred ($10,700.00) Dollars, but the said defendants allege that the plaintiff, in part performance only of the said supplemental contract deposited the said sum of Ten Thousand Seven Hundred ($10,700.00) Dollars and refused to deposit the further sum of Seventy-eight Hundred ($7,800.00) Dollars, under and by virtue of the said contract and that for said reason the said contract was broken by the said plaintiff to the great damage of the defendant Morley Construction Company.
[fol. 19] Defendants further deny that there are lawful bills or claims for labor approximately One Hundred Seven Thousand ($107,000.00) Dollars outstanding and deny that there remains in said deposit of the said M & T Trust Company under the terms of said supplemental agreement the sum of only Two Thousand ($2,000.00) Dollars and that the said allegations are untrue.

12. Defendants, and each of them, deny that under and by virtue of the terms of said supplemental agreement, it became and is entitled to have said final payment check so received by the defendant Morley Construction Company sent to said M & T Trust Company for deposit and disbursement.

13. Defendants deny that plaintiff, as surety upon the bond of defendant Morley Construction Company, was subrogated to the extent of Ten Thousand Seven Hundred ($10,700.00) Dollars, to the moneys or checks thereafter due from the United States Veterans Administration; or the United States Government, on said bond for said sum for the reason that it appears from the allegations of the petition

that it advanced said sum, pursuant to the terms of Exhibit "A", and not pursuant to the terms of said bond and that it breached the said contract, known as Exhibit "A", and for said reason is not entitled, either in law, or in equity, to any relief herein, under said contract, by reason of its advancement of the said sum.

14. Defendants admit that it is the duty of the Morley Construction Company to pay all lawful outstanding bills for labor and material furnished and used in the construction of said Government building, at Batavia, New York, but said defendants deny that plaintiff is entitled to have used for the purpose of paying such bills the said sum mentioned in the said check for the following reasons:

The plaintiff is entitled to have the Morley Construction Company pay such lawful bills, but it is none of the business of the said plaintiff from what source it derives the money from which the same are paid and the said defendants further deny that said sum has been improperly received by the defendant Morley Construction Company and deny that it has been improperly applied and converted to its own use, but the said defendants assert that the wrongful action of the plaintiff in preventing the Treasurer of the United States from paying the said check to the said defendant Morley Construction Company has prevented it from receiving the said money and has rendered the defendants, and each of them, powerless to use the said money for any purpose and powerless to enable the defendant Morley Construction Company to carry out its alleged [fol. 20] contract to deposit the said money with the M & T Trust Company.

15. Defendants, and each of them, deny that plaintiff is entitled to have a specific performance of said supplementary agreement and to have defendant Morley Construction Company ordered and required to forward said sum of Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars to M & T Trust Company, and deny that Defendant Morley Construction Company has received the said sum, either properly or improperly, but on the contrary that the plaintiff, by its wrongful acts in instituting the suit in the District of Columbia, and in instituting this suit, has wrongfully prevented defendant Morley Construction Company from receiving the said sum.

16. Defendants deny that the defendant Morley Construction Company is insolvent, or involved in other financial complications.

17. Defendants, and each of them, deny that plaintiff is entitled to have the money mentioned in said check impressed with a lien and impressed with a trust so that it can be disbursed and used in accordance with the terms of said supplementary agreement and deny that plaintiff is entitled to have it disbursed in accordance with its alleged right of subrogation and deny that defendant Morley Construction Company, will, or can, withdraw said money and use the same for improper purposes and deny that the Morley Construction Company can, or will, conceal the same so that said funds will not be available for proper purposes and said defendants deny that plaintiff has good reason to believe, and does believe, that defendant Morley Construction Company, unless restrained, will improperly convert or conceal such funds, and defendants deny that unless the said funds are so impressed with a trust or lien, and deny that unless defendant Morley Construction Company, and its officers, servants and agents are restrained and enjoined from withdrawing or disbursing said money, or any part thereof, for any purpose other than that covered by said supplementary agreement and unless said defendant Merchants Bank of Kansas City, Missouri, is restrained from permitting the withdrawal of said funds, or any part thereof, for any purpose, other than set out in said supplementary agreement, the plaintiff will suffer an irreparable loss, and defendants deny that plaintiff has no adequate remedy at law for any relief in the premises and said defendants allege that the plaintiff is not entitled to any relief and is not entitled to the relief which it seeks in this action.

[fol. 21] 18. Defendants allege that the actions of the plaintiff, in filing the said suits in the Supreme Court of the District of Columbia, and in this court, have subjected the defendant Morley Construction Company to an immediate multiplicity of suits and judgments and that Under Section 270, Title 40, U. S. C. A., no suit can be instituted against the plaintiff for any of the material or labor mentioned in the complaint, before six months have elapsed from the date of the final settlement between the Government of the United States and the defendant Morley Con-

struction Company and defendants further allege that the defendant Morley Construction Company has fully discharged its contract with the Government of the United States, so as to relieve the plaintiff from all liability on its said bond to the Government of the United States and if the said defendant Morley Construction Company were permitted so to do, it would now be in process of paying and collecting its debts and relieving the said plaintiff of liability on its said bond and that by reason of its action and conduct in the premises the said defendant Morley Construction Company has been prevented from proceeding with the reduction and extinguishment of liability on the said surety bond executed by the plaintiff.

Having thus made full answer to all the matters and things contained in the Bill styled "Complaint in Equity", the defendants pray that the said Bill be dismissed and for judgment for the costs of defendants, and each of them, in this behalf incurred.

Counter-Claim

And for its Counter-Claim against the above named plaintiff, the defendant Morley Construction Company herein reiterates and re-alleges all of the matters and things set forth in the preceding part of this Motion, Answer and Counter-claim, and further states that unless the plaintiff be directed and commanded by this court to dismiss the said suit or Bill of Complaint in Equity pending in the Supreme Court of the District of Columbia in Equity, aforementioned, and to have all proceedings in said suit annulled and for naught held, great and irreparable damage will result to this defendant and that this defendant will be unable to carry out its contracts, either with the plaintiff or with the other persons interested in the payment of their bills for labor and materials used in the construction of the said Veterans Hospital, at Batavia, New York, and that this defendant is threatened with litigation and suits by some of the persons whose bills are unpaid and to whom the said defendant is indebted and that unless this court immediately direct the said plaintiff to dismiss [fol. 22] its said action in the District of Columbia, and cause all proceedings in said suit to be annulled and for naught held, and dismiss this suit, and direct and enjoin the plaintiff from further interfering with this defendant,

and interfering with its use of the said check, and the amount of money called for therein, this defendant will be put to great and unnecessary expense and caused to suffer great and irreparable damage.

Wherefore, the defendant Morley Construction Company prays the court to enter its order directing the plaintiff to dismiss the said suit pending in the District of Columbia and to cease all proceedings which are now interfering with, or may hereafter interfere with, the use by the said defendant of the amount mentioned in the said check, to be discontinued and annulled and the Treasurer of the United States notified, and for such other and further relief as to the court may seem proper in the premises.

Morley Construction Company, by Herbert F. Morley, Its President. Merchants Bank of Kansas City, Missouri, by Hal R. Lebrecht, Its President. Buchholz & O'Donnell, Attorneys for Defendants.

Duly sworn to by Herbert F. Morley and Hal R. Lebrecht. Jurats omitted in printing

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[fol. 23] EXHIBIT "A" TO ANSWER

Filed Nov. 25, 1933, Frank E. Cunningham, Clerk

In the Supreme Court of the District of Columbia Holding an Equity Court. Maryland Casualty Company, a Corporation, Baltimore, Md., Mills Building, Washington, D. C., Plaintiff, vs. Morley Construction Company, a Corporation, Kansas City, Missouri, William A. Julian, Treasurer of the United States, Treasury Department, 15th Street and Pennsylvania Avenue, Washington, D. C., Defendants. Equity No. 56486.

Bill of Complaint for Injunction

To the Supreme Court of the District of Columbia, holding an Equity Court:

The plaintiff, Maryland Casualty Company, which is a corporation, respectfully states as follows:

1. Plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of Maryland

and maintains an office and carries on business in the District of Columbia, and brings this suit in its own right.

[fol. 24] 2. Defendant Morley Construction Company is a corporation; plaintiff has no sufficient knowledge or information to form a belief, and therefore is unable to aver where said Morley Construction Company is incorporated. Said defendant is sued in its own right. Defendant William A. Julian is a citizen of the United States, now resident in the District of Columbia, is Treasurer of the United States of America and is sued herein in his said official capacity.

3. On, to-wit, August 1, 1932, defendant Morley Construction Company, which is engaged in the general contracting business, entered into a certain contract in writing with the United States of America for the construction, furnishing and completion by said defendant for the Government of the United States of a certain structure known as Veterans' Administration Hospital, New York, Main Building No. 1, Batavia, New York, and pursuant to the provisions of said contract the aforesaid defendant employed subcontractors upon the work aforesaid and commenced and proceeded therewith.

4. In compliance with the provisions of the statute in such case made and provided and, on, to-wit, August 1, 1932, said defendant Morley Construction Company, as principal, and the plaintiff herein as surety, made, executed and delivered to the United States of America a certain writing obligatory in the form of a bond to secure the performance by said Morley Construction Company of its aforesaid contract with the United States of America, by which said defendant and this plaintiff bound themselves to the United States of America in the penal sum of $275,000.00. Said writing obligatory was subject to certain conditions therein set forth, as follows:

"Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform

and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prose- [fol. 25] cution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue."

5. During the latter part of April, 1933, said defendant Morley Construction Company became financially embarrassed and was unable to pay the subcontractors and material men for work and materials which said subcontractors and material men had performed and delivered in connection with the completion of the government contract aforesaid and on, to-wit, April 28, 1933, plaintiff, at the instance and request of said defendant, loaned and advanced to said defendant the sum of $10,500.00, to be used by said defendant in connection with the completion of the contract aforesaid and, in consideration of said loan, said defendant, at the time aforesaid, entered into a contract with the plaintiff by the terms whereof all future payments to be made by the United States of America to said Morley Construction Company were agreed to be sent to said defendant in care of the Manufacturers and Traders Trust Company of Buffalo, New York, and said remittances were agreed to be disbursed and paid under the joint supervision and control of plaintiff herein and of said defendant and to be applied in payment of labor and material bills incurred in connection with the government contract aforesaid. Pursuant to this agreement, said defendant Morley Construction Company, by letter of April 28, 1933, requested and authorized the Veterans Bureau Administration of the United States Government, which said Bureau was in charge of the government work aforesaid, to forward all future payments in connection with the government work aforesaid to said Manufacturers and Traders Trust Company and thereafter and until, to-wit, November 13, 1933, said Veterans Bureau did, in fact, forward such payments as requested and au-

thorized, but on, to-wit, said November 13, 1933, by inadvertence and oversight, United States check No. 2,213,115 in the sum of $59,782.22, which sum represents the final payment of the United States Government upon the contract aforesaid, was sent by said Veterans Bureau direct to said Morley Construction Company at its office in Kansas City, Missouri, instead of being sent as authorized and directed as hereinbefore set forth. Said check has not been presented to the Treasurer of the United States for payment.

6. Defendant Morley Construction Company is indebted to divers persons who have supplied it with labor and materials, which were used in the performance of the aforementioned contract, in the sum of, to-wit, Ninety Thousand Dol- [fol. 26] lars ($90,000.00), and said defendant has not repaid to plaintiff the sum of Ten Thousand Five Hundred Dollars ($10,500.00) loaned it as aforesaid. Plaintiff, by virtue of being surety on the bond of said Morley Construction Company, as aforesaid, is obligated to pay all persons who supplied labor and materials to said Morley Construction Company on the aforesaid project.

7. Plaintiff says that it has a lien against said final payment of $59,780.22 to prevent the diversion or misapplication of said fund, and to require it to be paid out to such persons who are unpaid and have furnished labor and/or materials to said Morley Construction Company in the performance of the aforesaid contract. Plaintiff is informed and believes and therefore avers and will offer evidence tending to prove that defendant Morley Construction Company is insolvent and that it does not intend to utilize the said sum of $59,780.22 in the payment of said labor and material bills, but to divert the same to other purposes, and plaintiff says that it has no adequate remedy at law, and unless William A. Julian as Treasurer of the United States is enjoined from honoring and paying the aforesaid check when it is presented for payment, plaintiff will suffer irreparable loss and injury, and the sum of $59,780.22 will be diverted and misapplied.

Wherefore, the premises considered plaintiff prays as follows:

First. That the process issue out of this Honorable Court directing the defendants Morley Construction Company

and William A. Julian, and each of them, to appear and answer the exigencies of this bill, in accordance with law and the rules of this Court, and that publication be substituted for personal service of process as to any of said defendants who are beyond the District of Columbia and cannot be personally served with process.

Second. That the defendant William A. Julian, as Treassurer of the United States, be enjoined pendente lite and permanently from honoring and paying United States Government check number 2,213,115, in the sum of Fifty-nine Thousand Seven Hundred Eighty Dollars and Twenty-Two Cents ($59,780.22), and/or any other check to said Morley Construction Company in payment of work performed in the construction, furnishing and completion of Veterans' Administration Hospital, New York main building #1, Batavia, New York, and that a receiver or receivers be appointed by this Honorable Court to receive and disburse under the direction of this Court the balance due from the United States of America upon the contract in the bill of complaint described.

[fol. 27] Third. That defendant Morley Construction Company be required to deliver said government check No. 2,213,115, to such receiver or receivers as may be appointed herein to the end that the proceeds thereof may be disbursed in payment of the obligations of said Morley Construction Company in connection with the performance of its said contract with the Government of the United States.

Fourth. That such accountings may be ordered herein as may be necessary or proper for the purpose of ascertaining and directing the proper distribution of the balance due from the United States of America upon the contract in the bill of complaint described.

Fifth. That plaintiff may have such other and further relief as to the Court may seem necessary and proper, the premises considered.

Maryland Casualty Company, by George B. Robey.
Whiteford, Marshall & Hart, 815 15th Street, N. W., by Roger J. Whiteford, Attorney for Plaintiff.

DISTRICT OF COLUMBIA, ss:

George B. Robey, being first duly sworn, on oath says that he is agent in the District of Columbia for the Mary-

land Casualty Company, a corporation named as plaintiff in the caption of this suit; that affiant has authority to execute this bill of complaint on behalf of said corporation and has knowledge of the facts in the bill of complaint set forth. Affiant has read the aforegoing bill of complaint subscribed by him on behalf of said Maryland Casualty Company and knows the contents thereof and verily believes the facts therein stated to be true.

George Robey.

Subscribed and sworn to before me this 25th day of November, 1933. Margaret H. Raedy, Notary Public, D. C. (Seal.)

Filed Nov. 27, 1933, Frank E. Cunningham, Clerk

In the Supreme Court of the District of Columbia. Holding an Equity Court. Maryland Casualty Company, a Corporation, Mills Building, Washington, D. C., Plaintiff, vs. Morley Construction Company, a Corporation, [fol. 28] Kansas City, Missouri, William A. Julian, Treasurer of the United States, Treasury Department, 15th Street and Pennsylvania Avenue, Washington, D. C., Defendants. Equity No. 56486.

Rule to Show Cause

Upon consideration of the bill of complaint filed herein, it is

Ordered, by the Court, this 27th day of November, 1933, that defendant William A. Julian, as Treasurer of the United States, show cause in this Court, if any he can, on the 5th day of December, 1933, at ten o'clock, A. M., on said day, or as soon thereafter as counsel can be heard, why he should not be enjoined, pending the hearing of this cause upon its merits, from paying United States Government check number 2,213,115, for the sum of Fifty-nine Thousand Seven Hundred Eighty Dollars and Twenty-two Cents ($59,780.22), and why a Receiver or Receivers should not be appointed in this cause, to receive and disburse under the direction of this Court the balance due from the United States of America upon the contract between defendant Morley Construction Company and the United States of America for the construction, furnishing and com-

pletion by said defendant, for the United States Government of Veterans' Administration Hospital, New York, Main Building No. 1, Batavia, New York, as prayed in said bill of complaint.

Provided, that a copy of this rule be served upon said defendant at least two clear days before the return day hereof.

F. D. Letts, Justice.

Marshal's Return

Served a copy of the above rule on William A. Julian, Treasurer of U. S. by serving G. O. Barnes, Asst. Treas. 11-27-33 Personally.

Edgar C. Snyder, U. S. Marshal in and for the Dist. of Columbia, by E. J. Graves, Deputy U. S. Marshal. B.

[fol. 29] EXHIBIT "[illegible]" TO ANSWER

Federal Reserve Bank of Kansas City

Nov. 27, 1933.

Merchants Bank, Kansas City, Missouri.

Attention Mr. Lebrecht

GENTLEMEN:

Reference is made to our telephone conversation in connection with government check No. 2,213,115, dated November 13, 1933, for $59,780.22, drawn on the Treasurer of the United States by J. B. Schommer, Disbursing Clerk, Veterans Administration, symbol 11-500, to the order of the Morley Construction Company, which bears your endorsement of November 22, 1933.

We are today in receipt of a letter from the Treasurer of the United States advising that injunction proceedings have been filed by the Maryland Casualty Company against the Morley Construction Company and the Treasurer of the United States in the Supreme Court of the District of Columbia Holding an Equity Court, Equity Case No. 56486, and final payment of this check is deferred until the rights of all parties can be determined.

In view of the above the Treasurer has requested immediate credit covering this item and we are, therefor-, charging your account $59,780.22 today, and ask that you kindly return the enclosed photostatic copy after it has served its purpose.

Yours very truly,

E. P. Tyner, Assistant Cashier.

J.
Enc.

IN UNITED STATES DISTRICT COURT

REPLY TO JOINT ANSWER AND ANSWER TO COUNTER-CLAIM—
Filed September 24, 1934; Refiled September 27, 1934

I.

Now Comes the plaintiff, Maryland Casualty Company, and for its reply to the joint answer of defendants Morley Construction Company and Merchants Bank of Kansas City, Missouri, states:

1. Plaintiff in reply to paragraph 2 of said answer admits that defendant Morley Construction Company re- [fol. 30] ceived a check #2213115, dated November 13, 1933 for Fifty-nine Thousand Seven Hundred Eighty and 22/100 Dollars ($59,780.22), drawn on the Treasurer of the United States, by J. B. Scommer, Disbursing Clerk, Veterans Administration, Symbol 11-500, payable to the order of Morley Construction Company, but denies that said check was deposited by Herbert F. Morley, President of the Morley Construction Company, with the defendant Merchants Bank of Kansas City, Missouri, for collection, and deny that it was agreed by defendant Merchants Bank that when collected to give credit to Herbert F. Morley, Trustee, but state the fact to be that said check was endorsed by defendant Morley Construction Company and delivered to the said Merchants Bank of Kansas City in purchase of a cashier's check then drawn payable to the order of Herbert F. Morley as Trustee with the understanding that the same was to be delivered to Herbert F. Morley when the check in the usual course of business was cleared by said Merchants Bank.

Plaintiff further admits that defendant Merchants Bank forwarded said check through the usual channel for collection to the Treasurer of the United States and deposited the same to the account of the said Merchants Bank with the Federal Reserve Bank of Kansas City, Missouri.

Plaintiff further admits that thereafter and before said check was paid by the Treasurer of the United States, plaintiff filed a bill of complaint for injunction and rule to show cause on the 25th day of November, 1933 in the Supreme Court of the District of Columbia alleging in substance the same matters and things against defendant Morley Construction Company which were alleged in the bill of complaint herein, and admits that said check has not yet been paid by the Treasurer of the United States.

Plaintiff further admits that the Treasurer of the United States refused to honor said check or pay the same, but states that plaintiff had no information as to whether or not the said Treasurer of the United States refused to pay the same until the said suit in the District of Columbia was disposed of, and therefore denies the same.

Plaintiff further admits that after the bringing of such action in the District Court of the District of Columbia, defendant Merchants Bank of Kansas City, Missouri received from the Federal Reserve Bank of Kansas City, Missouri, a notice advising Merchants Bank that the Federal Reserve Bank was in receipt of a letter from the Treasurer of the United States as set out in defendants' said joint answer.

Plaintiff further admits that defendant Merchants Bank of Kansas City, Missouri has not and cannot collect the amount due on said check to the Morley Construction Com-
[fol. 31] pany, and that the defendant Morley Construction Company cannot receive the amount due on said check during the pendency of this action and during the pendency of said action in the District of Columbia, but denies that notwithstanding the pendency of said suit in the District of Columbia that the plaintiff herein well knowing that it had by said proceedings in said Supreme Court of the District of Columbia rendered it impossible for the Merchants Bank of Kansas City, Missouri or the Morley Construction Company to receive said money or to use it for any purpose, filed this suit in this Court praying for relief which it knew this Court was without jurisdiction to grant

and to prevent acts upon the part of the defendants which it knew the defendants were powerless to perform, and denies that for said reason the plaintiff has prayed this Court to grant the relief its own acts have rendered unnecessary, and denies that a decree granting said defendant the relief which it seeks would be futile, and denies that for said reasons this Court is without jurisdiction to grant the relief prayed for by the plaintiff.

2. Plaintiff for reply to paragraph 5 of said answer denies that the plaintiff prepared Exhibit "A" attached to the plaintiff's bill of complaint and also the letter of proposal by defendant Morley Construction Company to the plaintiff, dated April 27, 1933, attached to the bill of complaint, and state that said Exhibit "A" and said letter of proposal were jointly prepared by duly authorized representatives of the Morley Construction Company and by duly authorized representatives of the plaintiff.

3. Plaintiff for reply to paragraph 6 of said answer denies that plaintiff failed to comply with the contract referred to in said paragraph of said answer, and denies that the plaintiff breached said contract and forfeited all rights thereunder.

4. Plaintiff in reply to paragraph 7 of said answer admits that defendant Morley Construction Company sent to the United States Veterans Administration the letter set out in paragraph 7 of said answer, and in further answer to said paragraph denies that the sum of $7,900.00 was on deposit with the M & T Trust Company of Buffalo, New York, under the terms of said depository contract at the time of the filing of defendants' answer, and denies that the M & T Trust Company failed and refused to give to the Morley Construction Company its canceled checks or a statement of said account, and denies that said M & T Trust Company has failed to discharge the function and duty contemplated by said agreement.

[fol. 32] 5. Plaintiff in reply to paragraph 8 of said answer states that although it alleged in plaintiff's bill of complaint and admitted in said paragraph 8 of defendant's answer that the defendant Morley Construction Company completed and carried out its contract with the Gov-

ernment of the United States, and that the same was accepted by the United States Government, but alleges the fact now to be that the said Government of the United States now contends that the defendant Morley Construction Company has failed in 394 separate particulars in the fulfillment of its contract and has demanded of Morley Construction Company and of this plaintiff as surety upon its bond that said 394 defects be remedied, but does admit that after apparent completion of said building the Government of the United States on or about November 1, 1933, issued a check hereinbefore referred to in plaintiff's bill of complaint and hereinbefore referred to, payable to the Morley Construction Company in the sum of $59,780.22.

6. Plaintiff in reply to paragraph 9 of defendant's answer admits that the number of the check so issued by the United States Government was 2213115 instead of 2213155. For further answer to said paragraph 9, plaintiff denies that the said check was intentionally sent by the United States Veterans Administration and its employees and officials to the Morley Construction Company in the discharge of their official duties, but reiterate the allegations in plaintiff's bill of complaint that the same was so sent by mistake, negligence or inadvertence.

7. Plaintiff for reply to paragraph 10 of said answer denies that the plaintiff demanded of and from said defendants that the said check be transferred and delivered to the plaintiff, and denies that the M & T Trust Company has failed to account to the defendant Morley Construction Company for the moneys amounting to $7,900.00 then deposited with the M & T Trust Company, and denies that said M & T Trust Company has failed and refused to give said defendant a statement of said account or the canceled checks issued against the same.

8. Plaintiff for reply to paragraph 11 of said answer denies that the plaintiff breached the supplemental contract referred to in said paragraph, and denies that defendant Morley Construction Company was damaged by reason of any alleged breach of contract.

9. Plaintiff for reply to paragraph 13 of said answer denies that it breached the contract, Exhibit "A", and denies that it is not entitled either in law or equity to any relief herein.

[fol. 33] 10. Plaintiff for reply to paragraph 14 of said answer denies that the plaintiff was guilty of any wrongful action in preventing the Treasurer of the United States paying the said check to the said defendant Morley Construction Company, and denies that plaintiff has prevented the defendant Morley Construction Company from receiving said money and has rendered said defendants, and each of them, powerless to use said money for any purpose, and powerless to enable said defendant Morley Construction Company to carry out its alleged contract to deposit said money with M & T Trust Company, but on the contrary states that the sole purpose of plaintiff's complaint is to require the defendants to deposit said money and to require its disbursement in accordance with said alleged contract, and the plaintiff at all times since said action was and is now anxious and willing that the said money be deposited and disbursed in accordance with said contract, Exhibit "A".

11. Plaintiff for reply to paragraph 15 of defendants' answer denies that plaintiff was guilty of any wrongful act in instituting the suit in the District of Columbia and in instituting this suit, and denies that it has wrongfully prevented Morley Construction Company from receiving said sum of money referred to in paragraph 15 of said answer.

12. Plaintiff for reply to paragraph 17 of defendants' answer, denies the allegation therein that the plaintiff was not entitled to any relief and is not entitled to the relief which it seeks in this action.

13. Plaintiff for reply to paragraph 18 of defendants' answer denies that the acts of the plaintiff in filing the said suits in the District of Columbia and in this Court has subjected the defendant Morley Construction Company to an immediate multiplicity of suits and judgments as set out in said paragraph, and further denies that the defendant Morley Construction Company has fully discharged its contract with the Government of the United States so as to relieve the plaintiff of all liability under its bond to the Government of the United States, but alleges the fact to be that the said Government of the United States has and is now making the contention that the Morley Construction Company has failed in 394 particulars in the ful-

fillment of its contract, and has demanded of this plaintiff under its bond that either it require the Morley Construction Company to remedy such defects or that it, the plaintiff, do so itself. Said plaintiff further answering said paragraph, denies that the defendant Morley Construction Company if permitted to do so would be now in the process of collecting and paying its debts and of relieving the plain-[fol. 34] tiff of its liability on said bond, but states that the plaintiff at all times and now is ready and willing that said money be disbursed in accordance with said contract, Exhibit "A", in the payment of the liabilities and debts of the Morley Construction Company for labor and material used in the construction of said hospital at Batavia, New York. For further reply, plaintiff denies that by reason of any act of the plaintiff the defendant Morley Construction Company has been prevented from proceeding with the reduction and extinguishment of liability on said surety bond executed by the plaintiff.

Wherefore, plaintiff having fully replied to the answer filed herein by defendants, prays as in its amended bill of complaint it has prayed.

II.

Now Comes the plaintiff and for its answer to the counterclaim filed herein by the Morley Construction Company states:

1. The Morley Construction Company herein and in said counterclaim, contained in its amended answer, has reiterated, realleged and adopted without setting them out all of the matters and things set forth in the answer, of which said counterclaim is a part, and the plaintiff in answer to said petition reiterates, re-alleges and adopts all the admissions, denials and allegations heretofore made in its reply to said answer, the same as if each such allegation and counterclaim were specifically set out and the same as if each such admission, denial or allegation of said reply were herein specifically set out.

2. For further answer to said counterclaim, plaintiff denies that unless the plaintiff be directed and commanded by this Court to dismiss this suit or bill of complaint in equity pending in the Supreme Court of the District of Columbia in Equity and to have all proceedings in said

suit annulled and for naught held that great and irreparable damage will result to this defendant, and denies that by reason thereof this defendant will be unable to carry out its contracts, either with the plaintiff, or with the other persons interested in the payment of their bills for labor and materials used in the construction of the said Veterans Hospital at Batavia, New York, but alleges the fact to be that any restraint placed upon the defendants is by reason of the action of this Court, and states that the plaintiff has at all times and now is ready and willing to dismiss the said proceedings in the District Court of the District of Columbia if the defendant Morley Construction Company will agree that the funds so impounded may be received and [fol. 35] disbursed in accordance with Exhibit "A" attached to plaintiff's cross-complaint, and is willing upon the final determination of this action directing and ordering the distribution of said fund for the payment of labor and material bills on said Batavia Hospital job to dismiss the proceedings so pending in the District of Columbia.

Wherefore, plaintiff having fully answered the counterclaim of defendant Morley Construction Company, asks that the same be dismissed.

Harris & Koontz, Attorneys for Plaintiff.

Service of copy of foregoing reply acknowledged this 18th day of Sept., 1934.

—— ——, —— ——, Attorneys for Defendant.

Served copy of foregoing reply on Martin O'Donnell, Esq., of the law firm of Buchholz and O'Donnell, attorneys for defendants, this 18th day of September, 1934.

Harris & Koontz, by Harry F. Murphy, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Decree—Filed October 23, 1934

Now on the 27th day of September, 1934, this cause came on regularly to be heard, the plaintiff appearing by Spencer F. Harris and Paul G. Koontz, its attorneys, and the de-

fendants appearing by Martin O'Donnell and Andrew Ellison, their attorneys, and evidence was heard by the Court, and the Court being unable to complete such hearing, said cause was continued until the 28th day of September, 1934 for further hearing.

And on the 28th day of September, 1934, the hearing of said cause was resumed, the same parties by the same attorneys being present, and the hearing of evidence was completed, and the arguments of counsel being by the Court heard, said cause was by the Court taken under advisement.

Now on this 22nd day of October, 1934, the Court having heretofore fully heard and considered the evidence produced and having fully heard and considered the arguments of counsel, and being fully advised in the premises, finds that the plaintiff is not entitled to a specific perform-[fol. 36] ance of the contract under date of April 28, 1933 introduced in evidence, and finds that the complainant is not entitled to be subrogated to any of the funds arising out of the contract between defendant Morley Construction Company and the United States Veterans Department by reason of the advancement by plaintiff to the defendant Morley Construction Company of the sum of $10,740.00; and as to the prayer for exoneration, the Court finds the issues in favor of the plaintiff and against the defendant Morley Construction Company and that the plaintiff is entitled to be exonerated by defendant Morley Construction Company from all liability on its bond as surety for said defendant on its contract for the construction of the Batavia, New York, United States Veterans Hospital referred to in evidence.

Now, therefore, it is ordered and adjudged by the Court that the defendant Morley Construction Company exonerate and hold harmless the plaintiff Maryland Casualty Company and that said Morley Construction Company promptly pay all labor and material claims arising out of or in connection with the Batavia, New York, United States Veterans Hospital contract and that the said defendant apply to such payment any and all monies it now has or which it may hereafter realize from the performance of the hospital contract aforesaid, including the proceeds of its claim or claims against the United States on account of

such contract and including the sum of $59,780.22 represented by the United States Treasury Warrant No. 2213155, dated November 13, 1933, or the proceeds of any other warrant or warrants which may be issued in place of said warrant, and including all other assets of the defendant Morley Construction Company which it now has or may hereafter acquire insofar as the same may be necessary for the payment of labor and material claims incurred in the performance of said hospital contract, except only any part or portion of proceeds from the performance of any other construction contract performed by defendant Morley Construction Company which may be required for the payment of labor and material claims incurred in the performance of such other construction contract or contracts.

It is further ordered that defendant Morley Construction Company shall deposit the proceeds from said United States Treasury Warrant No. 2213155 in some bank and such deposit shall be designated as a special trust fund for the payment of bills for labor and material used on the United States Veterans Hospital in Batavia, New York.

It is further ordered and adjudged that the defendant Merchants Bank of Kansas City, Missouri relinquish any claim which it may have to the funds aforesaid, whereupon said defendant shall be dismissed from this cause.

[fol. 37] It is further ordered and adjudged that the cross-bill of defendant Morley Construction Company be dismissed.

It is further ordered and adjudged that the defendant Morley Construction Company pay the costs of this action, for which let execution issue.

Merrill E. Otis, Judge.

Rec'd copy this 20th day November, 1934. Andrew Ellison, Attorney for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR REHEARING—Filed October 19, 1934

To the Honorable Merrill E. Otis, Judge of the District Court of the United States for the Western Division of the Western District of Missouri:

The petition of defendants for a rehearing in the above entitled cause shows:

1st. On the 27th day of November, 1933, plaintiff herein filed its bill of complaint alleging that by virtue of a contract dated April 28, 1933, between defendant Morley Construction Company and plaintiff, plaintiff was entitled to have all moneys thereafter received from the Government of the United States by the Defendant Construction Company for performance of a contract to build a certain Veterans Hospital at Batavia, New York, deposited in a joint bank account with the M & T Trust Company, at Buffalo, New York, subject to the control of the parties thereto; that plaintiff was entitled, as a surety upon a bond jointly executed by the Defendant Construction Company and plaintiff to be subrogated to all of the rights of the said Defendant Morley Construction Company against the Government and also that the said plaintiff was entitled to decree requiring defendant Morley Construction Company to apply all moneys due said defendant Morley Construction Company from the Government to the exoneration of said defendant from liability on said bond, and said plaintiff, in the said action, prayed specific performance of said alleged contract and prayed to be subrogated to the rights of the said plaintiff and prayed for such exoneration.

2d. On the 6th day of January, 1934, defendants herein filed their answer which, in substance, alleged that the plaintiff had failed to carry out the alleged contract on its part; that the said contract provided for the deposit in the [fol. 38] joint account only of the amounts received from the Government on estimate checks and that the amount of a warrant for Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars was not included in the contract; that the creditors on the bond referred to in the petition were not entitled at the time of filing the suit to demand or to compel or to receive immediate pay-

ment from the surety; that the defendant had paid nothing under and by virtue of its said bond and that the said defendant had before the institution of this suit, brought a suit in the Supreme Court of the District of Columbia praying for the same relief as in this case and caused said court to issue an injunction to the Treasurer of the United States enjoining said Treasurer from paying the money mentioned in said warrant to the Defendant Morley Construction Company and that said Defendant Morley Construction Company was prevented from receiving the amount due to it from the Government, by virtue of performance of the contract to build the said Hospital at Batavia, New York, and that for said reason the said plaintiff could not have the relief it prayed. The answer also prayed for dismissal on the ground that there was no equity in the bill. A counterclaim prayed for the dismissal of the suit in the Supreme Court of the District of Columbia.

3d. On the 2nd day of October, 1934, this court rendered a decision herein and filed an opinion and findings of fact and conclusions of law and directing plaintiff's counsel to prepare and submit for approval and entry a decree requiring the defendant Morley Construction Company to use all of its assets to pay the labor and material claims arising in connection with the Batavia contract, for which the plaintiff is liable under its bond, and to apply to such payment any money it has or will realize from assets now possessed by it including its claim against the United States on account of that contract.

4th. Said defendants state that the said decision is erroneous and void for the following reasons, to-wit:

A. Because it appears from the opinion, findings of fact and conclusions of law filed in this cause and also from the evidence that plaintiff failed to carry out its contract with defendant Construction Company; that for said reason this court denied to plaintiff the relief of specific performance prayed by plaintiff and thus and thereby found that the said plaintiff had itself failed to do equity to the said defendant Construction Company and that it failed to come into this court with clean hands; that at the time plaintiff filed its suit in this court its failure to perform said contract on plaintiff's part affected the legal relations of the

[fol. 39] parties to this action with reference to their rights in favor of and against each other under the said bond; that the relief of specific performance so sought in its bill of complaint was so connected with reference to the subrogation and exoneration sought and said conduct of the said plaintiff so affected the legal relations of the parties with reference to the issues presented by the pleadings that this court was without jurisdiction or power to grant the plaintiff any equitable relief in this action; that for said reason the decision is erroneous and void; that the only jurisdiction, power and authority which remained in this court after having found that plaintiff had so violated its contract and that its hands were unclean was to dismiss its bill and to order it to dismiss its like bill pending in the Supreme Court of the District of Columbia.

B. The evidence at the trial disclosed that the defendant Construction Company has a valid claim amounting to about Twenty Thousand ($20,000.00) Dollars against the New Amsterdam Casualty Company, a corporation, which claim against said New Amsterdam Casualty Company is valid and enforcible; that said claim is based upon the failure of said New Amsterdam Casualty Company to pay the amount due by it to the defendant Morley Construction Company under the terms and conditions of a bond executed by said New Amsterdam Casualty Company and a sub-contractor named Rupp by reason of the breach by said Rupp of his sub-contract, which breach occasioned damage to said Morley Construction Company in the sum of about Twenty Thousand ($20,000.00) Dollars; that the decision of this court requiring the Construction Company to use all moneys that may come into its hands only to pay said labor and material claims will prevent defendant Morley Construction Company from bringing an action against said New Amsterdam Casualty Company to recover of and from said New Amsterdam Casualty Company the said sum of Twenty Thousand ($20,000.00) Dollars; that said decision will prevent said defendant Morley Construction Company from using any money to defray the necessary expenses, including costs and counsel fees, incident to the prosecution of the said claim.

Said defendants further state that the defendant Morley Construction Company has a somewhat similar claim on a bond issued by the National Surety Company to a sub-con-

tractor of the said defendant on said Batavia buildings, by reason of the breach of his contract by the Plastering Contractor; that said defendant is informed and believes that the National Surety Corporation received without consideration, or adequate consideration, the greater part of [fol. 40] the assets of the National Surety Company and that said National Surety Corporation is liable to said defendant Morley Construction Company for the amount of said claim and that said defendant is informed and believes and therefore alleges that it cannot recover on either of the said bonds unless it engaged counsel and unless it has sufficient funds to pay the costs, expenses and counsel fees incident to the said litigation and that if said decision of this court be permitted to stand it will prevent said defendant Morley Construction Company from collecting the said claims.

That said defendants have been informed and believe that the bonds issued by the said New Amsterdam Casualty Company and said National Surety Company contain provisions providing that no suit or action shall be brought thereon more than one year after the completion of the contract and that the final settlement made by and between the Government of the United States and defendant Morley Construction Company was made on the 9th day of November, 1933, and that if said decision be not set aside, and said suit in the Supreme Court of the District of Columbia be not dismissed, the rights of said defendant Morley Construction Company to recover on said bonds may be barred and said defendant caused to lose said sums of Forty Thousand ($40,000.00) Dollars. That by the said decision the said defendant Morley Construction Company has been deprived of its property without due process of law, in violation of the command of the 5th Amendment to the Constitution of the United States.

C. At the time of filing the petition defendant Morley Construction Company had not and never had breached its obligations to the surety in any respect. It was seeking to use the money mentioned in the said warrant for the payment of the obligations for which the surety company is now liable; that no creditor was entitled to demand immediate payment from the plaintiff on its bond as surety for the Defendant Morley Construction Company until after May 9, 1934, and no person for whose benefit the

said bond was executed was authorized or entitled before said date to receive from the said Maryland Casualty Company any sum now due from it on the said bond; that at the time it brought this suit plaintiff was not authorized to and was disabled from paying to any such creditor any sum, or in any way to interfere with the right of the defendant Morley Construction Company to transact its business in its own way; that by the filing of the said suit and the suit in the District of Columbia the said plaintiff disabled the defendant Construction Company from carrying out its obligations to use the money mentioned in the [fol. 41] United States warrant referred to in the pleadings in the discharge of said obligations and that the acts and conduct of plaintiff in instituting and prosecuting this suit were wholly unwarranted and unnecessary and that for all of the foregoing reasons the said plaintiff was not entitled to the high relief of exoneration awarded to it by the decision herein and that said decision has deprived defendant Morley Construction Company of its property without due process of law:

D. The evidence failed to show that the indemnity accepted by plaintiff on its surety bond was insufficient.

E. The court was without jurisdiction to grant the relief awarded by its decision, judgment and decree, for the reason that the alleged creditors of the said defendant Morley Construction Company and the persons to whom the plaintiff might become liable on its said bond after the 27th day of November, 1933, were not parties to this action so that the court was without power or jurisdiction to ascertain the amount due to each one of the said creditors and the court was without jurisdiction to order defendant Morley Construction Company to pay to unknown persons unascertained amounts; the decision of the court is unenforcible for the said reason.

F. The opinion and findings disclose that all of the money due to the defendant Morley Construction Company from the Government is held by the Treasurer of the United States in obedience to the writ of injunction issued from the Supreme Court of the District of Columbia and that the defendant Morley Construction Company cannot receive any part of the money due to it from the United States Government.

G. Though plaintiff was directed to prepare a decree in this cause by the opinion heretofore herein filed on the 2nd day of October, 1934, yet the said plaintiff has failed and omitted to have any decree presented to this court and signed by this court and that for said reason the said plaintiff has waived any right to a decree or judgment in this cause.

H. The court erred in failing to find the facts requested on behalf of defendants.

I. The court erred in failing to adopt the conclusions of law requested on the part of defendants.

J. The court erred in sustaining plaintiff's objection to the offer of defendants to prove that plaintiff had before the trial of this cause filed an answer in the United States Court, at Buffalo, New York, in a suit brought by the United States for the benefit of the use plaintiffs on the [fol. 42] bond referred to in the Bill of Complaint, in which answer said plaintiff denied that it was liable on said bond to anybody.

K. The court erred in that over the objection of the defendants, it admitted oral evidence tending to show that the provision in the contract of April 28, 1933, providing that defendant Morley Construction Company should deposit in the alleged joint account all moneys and estimates thereafter received from the Government because of said work by which oral evidence attempted to show that the contract included the amount referred to in the final voucher, to-wit: Fifty-nine Thousand Seven Hundred Eighty and 22/100 ($59,780.22) Dollars, and this for the reason that said contract was not ambiguous and plainly referred to the work as the work to be thereafter completed.

L. The court erred in making the following finding of fact, included in Finding of Fact No. 2:

"It was intended and understood by the parties to the agreement, and it was a part of that agreement, that the moneys received from the United States to be so deposited should include the final payment under the contract made by the United States to the Construction Company, as well as all other payments under the contract made by the United States after April 27, 1933."

M. The court erred in including in Finding of Fact No. 7 the finding that the Casualty Company had reason to apprehend that it was the intention of the Construction Company to use the proceeds of the warrant referred to in Finding of Fact No. 4 for the purposes other than the payment of labor and material claims under the Batavia contract.

N. The court erred in Conclusion of Law numbered 3, for the reason that under the law and the evidence the plaintiff was not entitled to decree requiring the defendant to pay the labor and material claims arising in connection with the Batavia contract for which the plaintiff is liable as surety and so to exonerate the plaintiff.

O. The court erred in its conclusion of law numbered 4 to the effect that the defendants' cross-bill should be dismissed for the reason that under the pleadings and the evidence the defendants were entitled to the relief prayed in the said cross-bill.

P. That defendants have been informed and believe and therefore allege that in a suit on the bond of plaintiff as surety now pending in the District Court of the United States for the Western District of New York, excessive [fol. 43] claims have been filed against the defendant Morley Construction Company and plaintiff in said suit and that by the findings and decision herein and by reason of the acts and conduct of the plaintiff in causing the issuance of the injunctions herein and in the Supreme Court of the District of Columbia and in causing this court to render the decision herein, said defendant Construction Company is, and will be, unable to use its funds to defend against said claims, and hence cannot pay the expenses of counsel or the necessary expenses incident to the defense against the said excessive claims and if said defendant Morley Construction Company be not permitted to receive and use its funds to defend against the said excessive claims, the said defendant Morley Construction Company will sustain losses, the amount of which defendants are unable to state.

Wherefore, the petitioner prays that this court will grant a rehearing of said cause on such terms as to this court shall seem just as to the feature of the said cause, granting the relief to plaintiff and said defendant Morley Con-

struction Company prays the court to modify its opinion, decision and findings by directing the dismissal of the Bill of Complaint and by directing the plaintiff to dismiss the action mentioned in the opinion of the court in the Supreme Court of the District of Columbia and grant to said defendant such other and further relief as to the court may seem proper.

Dated October 19th, 1934.

Martin J. O'Donnell, Andrew Ellison, Attorneys for Defendants.

Duly sworn to by Herbert F. Morley. Jurat omitted in printing.

[fol. 44] Received copy of foregoing this 19th day of Oct., 1934.

Harris & Koontz, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING PETITION FOR REHEARING—Filed February 26, 1935

Defendants petition for a rehearing in the above entitled matter having been duly considered by the Court, and the Court being fully advised in the premises, is by the Court overruled. It Is So Ordered.

Merrill E. Otis, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 19, 1935

To Whom It May Concern and To The Above Named Plaintiff, or Harris & Koontz, Its Attorneys of Record:

You will please take notice that defendants, Morley Construction Company, a corporation, and Merchants Bank of Kansas City, Missouri, a corporation, feeling aggrieved by

the judgment rendered and entered in the above entitled cause, on the 26th day of February, 1935, do appeal from said judgment to the United States Circuit Court of Appeals for the 8th Circuit, a copy of Defendants' application for appeal is hereto attached.

Buchholz & O'Donnell, Attorneys for Defendant.

Service of a true copy of within and foregoing notice of appeal and also copy of application for appeal acknowledged and accepted at Kansas City, Missouri, this 19th day of April, 1935.

Harris & Koontz, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 19, 1935

The above named defendants, Morley Construction Company, a corporation, and Merchants Bank of Kansas City, Missouri, a corporation, feeling aggrieved by the judg-[fol. 45] ments, orders and rulings of the court in the above entitled cause, made and entered on the 26th day of February, 1935, do hereby appeal from the said judgment, order and ruling and decision overruling defendants' Motion for Rehearing in said cause and also the said defendants feeling aggrieved by the judgments, orders, rulings and decisions of the court in the above entitled cause, made and entered on the 23rd day of October, 1934, with reference to which orders the said Motion for a Rehearing was directed and to set aside which orders, judgments, rulings and decisions of the court the said Motion for Rehearing was filed, in which this court dismissed the said defendants' Counter-Claim, and in which the court found that the defendants were entitled to the relief of exoneration, to the United States Circuit Court of Appeals for the 8th Circuit, for the reasons set forth in the Assignments of Error and said defendants pray that their appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents on which said judgments were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 8th Circuit,

under the rules of said court in cases made and provided.

Defendants present herewith their appeal bond in the sum of Five Hundred ($500.00) Dollars, that being the amount fixed by the court as the appeal bond herein, and pray that said bond may be approved.

Buchholz & O'Donnell, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed April 19, 1935

Now comes Morley Construction Company and Merchants Bank of Kansas City, Missouri, and each of them, defendants herein, and say that the judgment and order herein entered on the 26th day of February, 1935, also the order and judgment entered herein on the 23rd day of October, 1934, in the above entitled cause are erroneous and against the just rights of the said defendants, and each of them, for the following reasons:

(1) Because the court erred in overruling the defendants' Motion to Dismiss the plaintiff's petition at the trial.

(2) Because the court overruled the defendants' Motion to Dismiss the plaintiff's petition before the trial.

(3) Because the court erred in refusing to dismiss the plaintiff's petition at the close of the evidence.

[fol. 46] (4) Because the court erred in overruling, over defendants' objections and exceptions, defendants' Motion for a rehearing.

(5) Because the court erred in holding, over defendants' objections and exceptions, that as a matter of law the plaintiff was entitled to judgment in its favor upon the pleadings and evidence in said cause.

(6) Because the court erred in holding that plaintiff, Maryland Casualty Company, as surety, was entitled to a judgment directing the defendant Morley Construction Company to exonerate the said plaintiff, notwithstanding this suit was filed herein on the 27th day of November,

1933, at which time there was no liability existing in favor of any obligee or creditor on the bond of the said surety against the said plaintiff and could not be before the 9th day of May, 1934.

(7) Because the court erred in holding that notwithstanding the court found that the hands of the plaintiff were unclean in that the said plaintiff in the said action brought a suit for specific performance of a contract with reference to matters involved in this suit, and this court found that the said plaintiff was, itself, guilty of failure to carry out the contract which it sought to have specifically enforced and its hands were, therefore, unclean with reference to all the relief sought in the said suit.

(8) Because the court erred in that notwithstanding the suit of the plaintiff was based upon a charge of moral turpitude against the defendant Morley Construction Company, and its officers, and that said charge was without foundation and found that the said charge was untrue, yet the court erred in failing to hold that by making the said charge against the said defendant Morley Construction Company, and its officers, the plaintiff did an act which made its hands unclean and precluded the plaintiff from getting any relief in a court of equity in this case with reference to the subject matter of the transaction involved in this suit.

(9) Because the court erred in holding that the plaintiff was entitled to the relief for exoneration in this case and this notwithstanding that there was no existing liability in favor of any person or creditor against the plaintiff as surety at the time that this suit was filed.

(10) Because the court erred in refusing to dismiss the plaintiff's bill and in directing that the defendants go hence without day and have their costs of and from the plaintiff.

[fol. 47] (11) Because the court erred in that notwithstanding it found that the plaintiff was not entitled to the relief of specific performance of the alleged contract and notwithstanding the court found that the plaintiff was not entitled to subrogation for the reason that it had paid and expended nothing as surety for the benefit of the defendant Morley Construction Company and notwithstanding it

had found there was no liability upon the part of said surety to any creditor of the said Morley Construction Company at the time of filing this suit or to any obligee named in the bond referred to in the plaintiff's bill of complaint, yet the court granted plaintiff the relief of exoneration.

(12) Because the court erred in permitting an examination of defendants' witnesses by the plaintiff on matters concerning which they had not been examined by the defendants.

(13) Because the court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff over the objection of the defendants.

(14) Because the court erred in sustaining objections to competent, relevant and material evidence offered by the defendants over the objection of the defendants, and each of them.

(15) Because the plaintiff herein brought this suit against defendants upon the ground that it was a surety for the defendant Morley Construction Company and by the bringing of this action violated its contract of suretyship and prevented the said defendant Morley Construction Company, its principal in the alleged bond, from carrying out its contracts with the obligees of said bond and thus and thereby breached and violated its contract of suretyship and forfeited all right to relief against its said principal, the said Morley Construction Company, or its officers, or the alleged indemnitors on the bond of the said surety company.

Wherefore, defendants, and each of them, because of each and all of the errors herein specified, pray that the judgments and orders entered against them herein on the 26th day of February, 1935, and on the 23rd day of October, 1934, be reversed at plaintiff's costs.

Buchholz & O'Donnell, Attorneys for Defendants.

[File endorsement omitted.]

[fols. 48 & 49] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed April 19, 1935

Now on this 19th day of April, 1935, there is presented to this court the application of defendants Morley Construction Company and Merchants Bank of Kansas City, Missouri, praying for the allowance of an appeal herein to the United States Circuit Court of Appeals for the 8th Circuit and it appearing to the court that there has been filed with said application for appeal an assignment of error, setting forth and apart, each error intended to be urged and it further appearing that a good and sufficient bond in the sum of Five Hundred ($500.00) Dollars, as an appeal bond, this being the amount of the appeal bond fixed by the court, it is therefore

Ordered by the court that an appeal be, and the same is, hereby allowed said defendants, as provided by law to the United States Circuit Court of Appeals for the 8th Circuit to review the proceedings and judgments in this case, whereby a judgment was rendered in favor of the plaintiff and against the defendants on the 23rd day of October, 1934, and wherein a judgment and order were rendered in this case on the 26th day of February, 1935, overruling the motion for a rehearing of defendants; that citation issue, as provided by law; that a full transcript of the proceedings be by the clerk of said court presented and filed with the clerk of the United States Circuit Court of Appeals for the 8th Circuit, and the appeal bond herein tendered is hereby approved.

It is further ordered that the defendants be, and they are hereby, given until on or before sixty (60) days from this date in which to file a bill of exceptions herein, and transcript of the evidence herein.

Done at Kansas City, Missouri, this 19th day of April, 1935.

Merrill E. Otis, District Judge

[File endorsement omitted.]

Bond on appeal for $500.00, approved and filed April 19, 1935, omitted in printing.

[fol. 50] IN UNITED STATES DISTRICT COURT

NOTICE OF FILING PRÆCIPE FOR TRANSCRIPT AND ELECTION AS TO PRINTING—Filed April 19, 1935

To Maryland Casualty Company, a corporation, and Harris & Koontz, its Attorneys of Record:

Please take notice that on the 19th day of April, 1935, the undersigned filed with the Clerk of this Court a praecipe for the record to be transmitted to the United States Circuit Court of Appeals, Eighth Circuit, on appeal sued out in the above cause, copy of which præcipe is herewith served on you.

You are further notified that on the 19th day of April, 1935, the undersigned filed with the Clerk of this Court an election as to printing, designating the Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, as the person under whose supervision the printing on the appeal of the above cause shall be done, a copy of which election as to printing is herewith served on you.

Dated this 19th day of April, 1935.

Buchholz & O'Donnell, Attorneys for Appellant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed April 19, 1935

To The Clerk of The Above Court:

You will please include in the record herein, the following portions of the record:

1st. All record entries.

2nd. Plaintiff's amended petition.

3rd. Defendants' answer to the plaintiff's amended petition.

4th. Plaintiff's reply.

5th. Order, judgment and decree of the court denying plaintiff the relief of specific performance and the relief

[fol. 51] of subrogation and granting plaintiff the relief of exoneration.

6th. Defendant's petition for a rehearing.

7th. Defendant's notice of appeal with acknowledgment of service.

8th. Defendants' assignments of error.

9th. Bond for appeal.

10th. Order allowing appeal.

11th. Citation with service.

12th. Transcript of evidence.

13th. Election to have transcript printed by Clerk of the District Court.

14th. This præcipe.

15th. Certificate of the clerk authenticating the record.

Buchholz & O'Donnell, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING—Filed April 19, 1935

The Defendants above named hereby elect to have the Clerk of the Court of the District of the United States for the Western Division of the Western District of Missouri, at Kansas City, supervise the printing herein on appeal of this cause.

Buchholz & O'Donnell, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING TIME TO FILE TRANSCRIPT OF EVIDENCE—Filed April 19, 1935

Now on this day, the defendants are allowed forty (40) days from this date in which to file a transcript of the evidence.

Dated April 19, 1935.

Merrill E. Otis, District Judge.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS—Filed May 22, 1935

Now on this day for good cause shown the time in which to file the bill of exceptions herein is extended 40 days from this date.

Merrill E. Otis, Judge.

May 22, 1935.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed May 22, 1935

Now on this day for good cause shown, the time in which to file the transcript of the record in the United States Circuit Court of Appeals is hereby enlarged 40 days from this date.

May 22, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS AND TRANSCRIPT—Filed June 29, 1935

Now on this day for good cause shown the time in which to file the bill of exceptions and transcript herein is extended 40 days from this date.

June 29th, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed June 29, 1935

Now on this day the time in which the Appellant may file transcript in the Appellate Court is hereby extended forty days from this date.

June 29, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS AND TRANSCRIPT—Filed July 30, 1935

Now on this 26th day of July, 1935, the time in which to file the bill of exceptions and Transcript herein is extended forty days from August 1st, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed July 30, 1935

Now on this 26th day of July, 1935, the time in which the Appellant may file transcript in the Appellate Court is hereby extended forty days from August 1st, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER, EXTENDING TIME TO FILE BILL OF EXCEPTIONS—Filed September 7, 1935

Now on this day for good cause shown the time in which to file the bill of exceptions and transcript herein is extended 40 days from this date.

September 7, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed September 7, 1935

Now on this day the time in which the Appellant may file transcript in the Appellate Court is hereby extended forty days from this date.

September 7, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Statement of Evidence—Filed September 23, 1935

Be It Remembered:

That all the evidence herein was oral with the exception of such exhibits as are included in this statement.

[fol. 54] On Thursday, September 27, 1934, the above entitled cause came on regularly for trial herein before the Honorable Merrill E. Otis, District Judge.

Thereupon, HERBERT F. MORLEY being called as a witness by plaintiff testified that he was President of the Morley Construction Company, and had been connected with it since its incorporation. The company was incorporated

for Ten Thousand Dollars ($10,000.00) all paid in in cash. The capital stock had never been increased. The corporation never had a record book showing the assets of the corporation. The only record in that connection was the Articles of Incorporation.

"Q. Don't you carry a book account showing the assets and liabilities of your company?

A. No book. The only record that we have is the money in the bank."

The witness testified that the corporation secured information for its income tax statements from the records on what it paid out on the jobs. It had no copy of a statement of assets and liabilities. The only money added to the capital of the corporation was Five Thousand Dollars ($5,000.00), put in at the time the contract sued on was made. It was borrowed by the Corporation and constituted a liability of the Corporation.

"Q. What assets did it have on the 27th day of November, 1933?

Mr. O'Donnell: If the Court please, we object for the reason that the relevancy of that question doesn't appear at this time.

The Court: Overruled.

A. The final payment due on the Batavia, New York job."

In addition to that the company had a bank balance of between $8,000.00 and $10,000.00 in the M & T Trust Company, and claims against either three of four defunct and defaulting casualty companies and a claim against the government involving $1,130.00, growing out of the Batavia job.

The witness could not state what the liabilities were without checking the record, but stated that the outstanding bills for labor and material were in the neighborhood of $95,000.00. The corporation had a list of those labor and material claimants and the witness had checked them from time to time.

"Q. Have you an up-to-date list with you?

A. Yes, sir.

Q. May I see it?

A. It is there in the records."

[fol. 55] (Which said list, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 1, EFM".)

The witness testified that this list represented a total unpaid labor and material bills as of the present date. That the list represented what the corporation records showed as compiled by the office superintendent, and it was a complete list; that it did not coincide with the amount that the claimants were demanding as some claimants were claiming more than shown by the record, but that the amounts were correct according to the terms of the contracts between the Corporation and the materialmen and contractors.

"Mr. Harris: We offer Exhibit 1 in evidence."
Said Exhibit is as follows:

"PLAINTIFF'S EXHIBIT 1

Batavia, New York, Job Accounts

Concrete Engineering Co.	$6,359.18
American Terra Cotta Co.	2,986.67
Lackawanna Steel Construction Co.	1,303.46
Decatur Steel & Iron Co.	4,032.65
McPhillips Mfg. Co.	10,921.90
Russel-Erwin Mfg. Co.	7,895.06
Fred J. Burt	562.85
Olson Granite Co.	1,215.78
Johnson Roofing & Sheet Metal Works	6,501.04
Turner Resilient Floors Co.	7,300.00
C. H. Patek—sub-contractors	5,993.88
Rust Engineering Co.	232.83
The Logan Co.	202.90
American Builders Supply Co.	1,568.76
Rochester Stationery Co.	2,564.73
Swenson Stone Co.	733.22
Genessee Stone Product Co.	1,913.04
Ghiandoni & Associates	1,193.42
Planmondon-Gabriel Co.	6,481.76
J. J. Luraschi	158.24
Toledo Plate & Window Glass Co.	898.72

"Plaintiff's Exhibit 1—Continued

National Cleaning & Tuckpointing Co.	291.46
A. Palmeri & Co.	1,060.83
Harvard Tree & Shrub Co.	625.00
Milton Bemis	50.00
State Steel Co.	900.00
Goldsmith Metal Lath Co.	875.85
Patton Clay Mfg. Co.	769.59
John Schutt Jr.	170.80
[fol. 56] Genessee Lumber Co.	362.53
Fred Salway	374.39
Casey Carting Co.	133.75
U. S. Gypsum Co.	1,216.11
Central Clay Products Co.	1,992.14
Batavia Lumber & Coal Co.	252.95
Bar & Creelman	77.75
Globe Plaster Co.	71.27
Hollenbeck Testing Lab.	50.00
Carlton Sleight	46.51
John Glade & Son	28.62
Riders Drug Co.	19.25
Batavia Lumber & Coal Co.	2,794.45
Hudson Plastering	7,573.03
Niagara Lockpost Power Co.	14.97
	$90,771.34"

Plaintiff's Exhibit 2 was marked for identification by the reporter "Plaintiff's Exhibit 2 EFM".

"Mr. Harris: Now, plaintiff's Exhibit 2 you say is the claims that were made against you in addition to labor and material?

A. That is right."

The item of $5,000.00 which was borrowed and put in the bank was in addition to the Exhibit 1. The Maryland Casualty Company advanced $10,700.00 under the contract, which has not been paid off and was not included in the list. In addition the corporation owed the Maryland Casualty Company $4,100.00 or $4,200.00 for premiums.

That the items on the second list (Plaintiff's Exhibit 2) contained two items which were claims by defaulting con-

tractors, which the corporation did not owe and should be subtracted from the total of Exhibit 2. That the corporation had unliquidated counter-claim against these disputed accounts; that no suit had been brought on them; that in addition to the $4,100.00 premiums, and the $10,700.00 to the Maryland Casualty, and the $5,000.00 owing to the bank, the corporation owed nothing else, on the New York job.

That there were no judgments in favor of the S & M at the time of the filing of the bill. That there was a claim, but witness did not know whether it was a judgment or not. That the claim for which the Ithaca Trust Company brought suit was $3,000.00 and was not included in Plaintiff's Exhibit 2. That at the time of the filing of the bill, the only other indebtedness of the corporation not arising out of the Batavia Job were claims for labor and materials [fol. 57] on the Fort Lyon's job, but that the current estimates were sufficient to take care of those bills; that the witness was not familiar with the transactions on the Knoxville Job.

Thereupon Plaintiff's Exhibit 2 was received in evidence and is as follows:

"PLAINTIFF'S EXHIBIT 2

Batavia, New York, Job—
Accounts in Dispute

D. Giamberdino—Plaster	$4,124.04
D. Giamberdino—Tile	1,020.05
Dravo Equipment Co.	321.63
Mudy Rupp	2,334.94
Roy Herman	130.50
Martin N. Y. Tent & Duck Co.	538.80
J. G. McJury	54.00
R. L. Carter	404.27
Wm. H. Robinson	141.50
Clyde Sales Co.	20.06
	$9,089.79"

The witness was on the Batavia Job more than his brother and was there continuously until September of 1933, at which time it was finished, except the outside grading. He was there on April the 27th, 1933, when an

agreement marked Plaintiff's Exhibit 3 was signed and when the letter which became a part of it addressed to the Maryland Casualty Company was signed. On the same or the next day a letter to the Veterans' Bureau was signed and mailed.

Thereupon Plaintiff's Exhibit 3 was offered in evidence and is as follows:

"PLAINTIFF'S EXHIBIT 3

Agreement

Whereas the Morley Construction Company of Kansas City, Missouri, is the General Contractor under a contract with the United States Government for the construction of the Veterans' Administration Hospital at Batavia, New York, said contract bearing date of July 23, 1932, and

Whereas the Maryland Casualty Company executed a bond bearing date of August 1, 1932 wherein and whereby said Maryland Casualty Company guaranteed the faithful performance of the above mentioned contract and

[fol. 58] Whereas the Morley Construction Company has encountered financial difficulties in the construction of said Veterans' Administration Hospital and has called upon the Maryland Casualty Company for financial assistance in regard to the completion of said contract in accordance with a letter to the Maryland Casualty Company from the Morley Construction Company bearing date of April 27, copy of which is hereto attached and made a part of this instrument, in consideration of the payment hereinafter referred to and in consideration of the mutual promises of the parties hereto it is mutually agreed as follows:

First. The Morley Construction Company hereby agrees to deposit at the M & T Trust Company in the City of Buffalo, New York the sum of Five Thousand ($5,000.00) Dollars and to deposit from time to time certain other sums of money to be used toward the completion of said contract. The Morley Construction Company further agrees to deposit in said account for the benefit of said contract all moneys and estimates received from the United States Government because of said work.

Second. The Maryland Casualty Company hereby agrees to deposit in said M & T Trust Company to the account

of the Morley Construction Company the sum of Five Thousand ($5,000.00) Dollars.

Third. It is mutually understood and agreed that the said Maryland Casualty Company shall have joint control of all moneys deposited in said account and that no check, draft or withdrawal order shall be drawn on said account and paid by said bank without the approval of the said Maryland Casualty Company by its representatives, James F. Kelly and/or Martin C. Shaus, said approval to be designated on said check, draft or withdrawal order by the initials of the above individuals, to-wit, J. F. K. and/or M. C. S.

Fourth. The Morley Construction Company hereby agrees to pay back to the Maryland Casualty Company the aforementioned sum of Five Thousand ($5,000.00) Dollars out of the proceeds of said job if there be sufficient money and if not, they hereby bind themselves and agree to pay said money themselves to the Maryland Casualty Company.

Fifth. The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plasterers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient [fol. 59] money to complete the Giamberardino plastering contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory to the Maryland Casualty Company.

Sixth. The Morley Construction Company hereby agrees to pay to the Maryland Casualty Company any and all moneys advanced to them for payment of plasterers' claims or other laborers' claims on the D. Giamberardino & Sons contract, and any and all moneys advanced by the said Maryland Casualty Company to assist in the completion of the D. Giamberardino & Sons Contract.

Seventh. The Morley Construction Company hereby agrees to give a note in the sum of Five Thousand ($5,000.00) Dollars bearing even date of this instrument to the Maryland Casualty Company as security to them for the payment of the sum of Five Thousand ($5,000.00) Dollars

mentioned in Paragraphs Second and Fourth of this instrument. Dated: April 28, 1933.

Morley Construction Company, by H. F. Morley, Pres. Maryland Casualty Company, by James F. Kelly.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

On this 28 day of April, 1933, before me personally appeared H. F. Morley, to me known, who, being by me duly sworn, did depose and say that he is the President of the Morley Construction Company, the company described in and which executed the foregoing instrument; that he has the authority to sign such instruments and that he affixed his signature thereto by such authority.

William H. Robinson, Notary Public in and for the County of Erie, N. Y.

April 27th, 1933.

Maryland Casualty Company, Baltimore, Maryland.

GENTLEMEN:

As you have been heretofore informed, the work on the Veterans' Administration Hospital at Batavia, New York, has been stopped by reason of labor difficulties encountered by Sub-Contractor, D. Giamberardino & Sons.

[fol. 60] It is claimed by the laborers that they have not been paid since March 9, 1933. These unpaid claims amount to about $7,500.00. In addition to this there are some disputed bills, the laborers claiming that they have not received the full prevailing wage although they have signed receipts for the full amounts. These claims aggregate approximately $5,000.00. This is as the situation now appears.

The work on the plastering contract is at a standstill and this letter is to inform you that the Morley Construction Company, because of the situation on the plastering contract over which they had no control and because of their general financial situation cannot proceed with the work without some financial assistance. We propose that the Maryland Casualty Company advance to us sufficient money to meet the unpaid plasterers' and laborers' bills as stated above—that is, $7,500.00—and in addition to that sufficient money to meet the disputed bills that we have

receipts for if this is necessary to get the men back to work. We estimate that the cost to complete the plastering contract will be approximately $19,550.00. This figure does not include the unpaid plasterers' and laborers' claims as stated above. There is still owing on this contract the sum of $13,500.00, leaving a balance of $6,050.00 to complete the plastering contract on which figures we need financial assistance.

We agree to give the Maryland Casualty Company a demand note payable one year from date for the moneys advanced and, as an additional security, to assign any right which we may have against the National Surety Company, the bonder of D. Giamberardino & Sons plaster contractor, up to the amount of the indebtedness and will render every assistance necessary to prosecute suit against the National Surety Company or any other corporation or individual against which we have a right of action.

In the event that the financial assistance as stated above is given to us we have the assurance that our bank will advance us sufficient money to complete the job according to our contract and pay all outstanding indebtedness on this job.

We wish to urge upon you at this time the necessity of prompt action in this matter. The labor condition is a serious one and the Government is demanding immediate action. The facts contained in this communication are substantially true and are set out for the purpose of inducing the Maryland Casualty Company to advance moneys and credits to us as stated above.

Very truly yours, —— ——.

Copy."

[fol. 61] Thereafter plaintiff offered Exhibit 4, which was duly marked for identification and received in evidence and is as follows:

"PLAINTIFF'S EXHIBIT 4

(Copy)

April 28, 1933.

United States Veterans' Administration, Construction Division, Arlington Building, Washington, D. C.

GENTLEMEN:

In the payment of future estimate checks to the Morley Construction Company on the U. S. Veterans' Hospital at

Batavia, New York, it is hereby requested that you forward checks to the Morley Construction Company c/o Manufacturers and Traders Trust Company, Buffalo, New York, Attention Edward W. Miller, Vice President.

Will you kindly acknowledge receipt of this communication and advise if this arrangement will be satisfactory to you?

Very truly yours, Morley Construction Company,
by —— ——.

BDM:HS."

Thereupon the witness identified Plaintiff's Exhibit 5 as a bond and the Exhibit was offered and received in evidence, and is as follows:

PLAINTIFF'S EXHIBIT 5—EFM

Standard Form No. 25

Approved by the President Nov. 19, 1926

Standard Government Form of Performance Bond

(Construction or Supply)

Know All Men By These Presents, That we, Morley Construction Company, a Corporation with offices in Kansas City, Missouri (See Instructions 4, 5 and 7) as Principal and Maryland Casualty Company, a Corporation of the State of Maryland, as Surety, (See Instructions 2, 3, 4 and 7) are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal [fol. 62] sum of Two Hundred and Seventy-five Thousand and no/100 dollars lawful money of the United States, for the payment of which sum well and *and* truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated July 23rd, 1932, for construction and finishing complete, at Veterans' Administration

Hospital, Batavia, New York, Main Building No. 1, Dining Hall and Attendants' Quarters Building No. 2, Recreation Building No. 4, Nurses' Quarters Building No. 5, M. O. C. Residence Building No. 6, two Officers' Duplex Quarters Buildings Nos. 7 and 8, Laundry Building No. 9, Storehouse Building No. 10, Boiler House Building No. 11, including Radial Brick Chimney and Pipe Tunnel Transformer and Animal House Building No. 12, Garage Building No. 13, Flagpole No. 14, incinerator Building No. 15, Sewage Pump House No. 17, Connecting Corridors Nos. 1-2 and 1-4.

Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this First day of August, 1932, the name and corporate seal

of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[fol. 63] In presence of—

.... (Seal.)
(Individual principal)

....
(Address) (Business Address)

.... (Seal.)
(Individual principal)

....
(Address) (Business Address)

.... (Seal.)
(Individual surety)

....
(Address) (Business Address)

.... (Seal.)
(Individual surety)

....
(Address) (Business Address)

Attest:

Morley Costruction Company,
(Corporate principal),
1643 Belleview, Kansas City,
Mo.
(Business Address.)

..... By H. F. Morley,
President
(Affix corporate seal.)

Attest:

Maryland Casualty Company,
(Corporate surety)
Baltimore, Maryland,
(Business Address.)

..... By A. J. D. Peterson,
Attorney-in-Fact.
(Affix corporate seal.)

The rate of premium on this bond is $15.00 per thousand.
Total amount of premium charged, $8,104.50.
(The above must be filled in by corporate surety.)

(2) 10—1773

Standard Form No. 25—Sheet 2

(Performance Bond)

Certificate as to Corporate Principal

I, C. B. Merrell, certify that I am the secretary of the corporation named as principal in the within bond; that H. F. [fol. 64] Morley, who signed the said bond on behalf of the principal was then President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body. C. B. Merrell, Sec'y. (Corporate Seal.)

Affidavit by Individual Surety

State of ——,

County of ——, ss:

I, —— ——, being duly sworn, depose and say that I am one of the sureties to the foregoing bond; that I am a citizen of the United States, and of full age and legally competent; that I reside at —— and that I am worth in real estate and personal property the sum of — dollars, over and above (1) all my debts and liabilities, owing and incurred, (2) any property exempt from execution, (3) and aggregate full penalties on all other bonds on which I am surety, and (4) any pecuniary interest I have in the business of the principal on said bond; that I own, unincumbered, real estate, the fee of which is in my name, worth — dollars, located in ——; that said property is not exempt from seizure and sale under any homestead law, community, or marriage law, or upon any attachment, execution, or judicial process, and that I am not surety on any other bonds, except as follows:

.....

(State character and amount of each bond. If not on other bonds, so state)

.....

(Surety's signature.)

Subscribed and sworn to before me this — day of ——, 19—, at ——. .....

.....

(Title of official administering oath.)

(Official Seal.)

[fol. 65] (3) 10—1774

Affidavit by Individual Surety

State of ——,
County of ——, ss:

I, —— ——, being duly sworn, depose and say that I am one of the sureties to the foregoing bond; that I am a citizen of the United States, and of full age and legally competent; that I reside at —— and that I am worth in real estate and personal property the sum of — dollars, over and above (1) all my debts and liabilities, owing and incurred (2) any property exempt from execution, (3) the aggregate full penalties on all other bonds on which I am surety, and (4) any pecuniary interest I have in the business of the principal on said bond; that I own, unincumbered, real estate, the fee of which is in my name, worth — dollars, located in ——; that said property is not exempt from seizure and sale under any homestead law, community, or marriage law, or upon any attachment, execution, or judicial process; and that I am not surety on any other bonds, except as follows:

.....

(State character and amount of each bond. If not on other bonds, so state)

.....

(Surety's signature)

Subscribed and sworn to before me this — day of ——, 19—, at ——.

.....

.....

(Title of official administering oath)

(Official Seal.)

Certificate of Sufficiency

I, —— ——, do hereby certify that —— ——, one of the sureties named above, is personally known to me, and that, to the best of my knowledge and belief, the facts stated by such surety in the foregoing affidavit are true.

.....

.....

(Address)

[fol. 66] Certificate of Sufficiency

I, —— ——, do hereby certify that —— ——, one of the sureties named above, is personally known to me, and that, to the best of my knowledge and belief, the facts stated by such surety in the foregoing affidavit are true.

.....

.....

(Address)

(4) 10—1773

Standard Form No. 25—Sheet 3

(Performance Bond)

Instructions

1. This form shall be used for construction work or the furnishing of supplies, whenever a bond is required.

2. The surety on the bond for any bid or for the performance of the contract may be any corporation authorized by the Secretary of the Treasury to act as surety, or two responsible individual sureties. Individual sureties shall justify in sums aggregating not less than double the penalty of the bond.

3. A firm, as such, will not be accepted as a surety, nor a partner for copartners or for a firm of which he is a member. Stockholders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their stock holdings therein. Sureties, if individuals, shall be citizens of the United States, except that sureties on bonds executed in any foreign country, the Canal Zone, the Philippine Islands, Porto Rico, Hawaii, Alaska, or any possession of the United States, for the performance of contracts, entered into in these places, need not be citizens of the United States, but if not citizens of the United States shall be domiciled in the place where the contract is to be performed.

4. The name, including full Christian name, and residence of each individual party to the bond shall be inserted in the body thereof, and each such party shall sign the bond with his usual signature on the line opposite the scroll seal,

and if signed in Maine, Massachusetts, or New Hampshire, an adhesive seal shall be affixed opposite the signature.

5. If the principals are partners, their individual names shall appear in the body of the bond, with the recital that they are partners composing a firm, naming it, and all the members of the firm shall execute the bond as individuals.

[fol. 67] 6. The signature of a witness shall appear in the appropriate place, attesting the signature of each individual party to the bond.

7. If the principal or surety is a corporation, the name of the State in which incorporated shall be inserted in the appropriate place in the body of the bond, and said instrument shall be executed and attested under the corporate seal as indicated in the form. If the corporation has no corporate seal the fact shall be stated, in which case a scroll or adhesive seal shall appear following the corporate name.

8. The official character and authority of the person or persons executing the bond for the principal, if a corporation, shall be certified by the secretary or assistant secretary, according to the form attached thereto. In lieu of such certificate there may be attached to the bond copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

9. Each individual surety shall justify, under oath, according to the form appearing on the bond, before a United States commissioner, a clerk of a United States court, a notary public, or some other officer having authority to administer oaths generally. If the officer has an official seal it shall be affixed, otherwise the proper certificate as to his official character shall be furnished. Where citizenship is not required, as provided in paragraph 3 of these Instructions, the affidavit may be amended accordingly.

10. The certificate of sufficiency shall be signed by a judge or clerk of a court of record, a United States district attorney or commissioner, or the president or cashier of a bank or trust company.

11. The date of the bond must not be prior to the date of the instrument for which it is given.

(5) 10—1744

There were two men in active charge of the work; Mr. Frizzell in charge of the office and Mr. Rieman. Mr. Frizzell had charge of keeping the accounts. The only contracts that the Morley Construction Company had during its existence were the Batavia Job and the Fort Lyon Job.

Cross-examination:

Upon cross examination the witness testified that the figures which he had incorporated in the two exhibits were compiled from records that were kept on the job. Plaintiff's Exhibit 1 represents the money due sub-contractors and material men for labor and material at this date; that [fol. 68] several of the items claimed by labor and material men were disputed and that the amount of $90,771.34 represented the amount actually due them under their contracts and not the amount claimed. That the Morley Construction Company had some claims against sub-contractors for failure to carry out their contracts. The item on Plaintiff's Exhibit 2 in the amount of $9,089.79 and headed "Accounts in Dispute."

"Q. Does that mean then that this $90,000.00 according to your contention is reduced by that amount?

A. No, reduced by the amount that it shows on there."

Defendant's Exhibit 1 was marked for identification by the reporter; the witness stated that it was a record of the outstanding bills on the Batavia operation only, together with a list of the assets as of the present date. It does not cover the assignment to the Ithica Trust Company and it does not show the amount owing to the Maryland Casualty Company and what was owed to Mr. B. D. Morley; that the claim against the New Amsterdam Casualty Company in the amount of $19,919.11 and another small claim in the amount of $532.83, and a claim against the Standard Accident Company in the amount of $521.00 were all against the not defunct, but which have refused to pay the claims. The claims against the National Surety Company in the amount of $20,689.29 arose out of the default of the plastering contractor whose name was Giamberdino, on whose default necessitated the conference of April 28, 1933.

Under the heading of "Claims Against Government", the item Caulking Steel Company in the amount of $1,130 was a valid claim.

The item of the left-hand side of the Exhibit in the amount of $82,771.00 represented the $90,000.00 less the $8,000.00 claimed against the Concrete Engineering Company and the Phillips Manufacturing Company for penalties for failure to perform within the time stipulated.

The item of $41,661.23 represented the total claim against the bonding companies and the $1,130 represented the total claim against the government, and the Exhibit 1 showed the total claims to be $42,791.23. "Final Check" $59,760 and some cents, and the money in the M & T Trust Company $3,818.61 and the total figure of corporation assets according to the Exhibit was $106,369.84, from which had been deducted $82,771, leaving a balance of $23,598.84 as the total assets claimed, aside from these other claims I have mentioned. These figures were compiled from the records kept on the job.

The witness produced a document marked by the reporter for identification as Defendant's Exhibit 2, which he stated was a complete record of the figures kept on the [fol. 69] job. The item thereon styled, "Batavia, New York, Job, Accounts Settled Since Job Completed" in the amount of $5,781.76 did not diminish the total indebtedness:

At the time the suit was filed, the construction company and the Maryland Casualty Company had on deposit in the Bank at Buffalo $7,900, approximately. The witness stated that the company had approximately $60,000 represented by final payment vouchers plus the $7,900 on deposit in the Buffalo Bank, plus the claim against surety companies; That, therefore, the total amount of liabilities were $82,771 and the total amount of assets were $106,369.84, which, however, included only bills for labor and material, and that the figure of $106,369.84 represented the total assets of the Morley Construction in connection with the Batavia Job, in New York; there are no other assets but there are other liabilities which have already been brought out.

"The Court: Does it include other assets?

A. No, sir.

The Court: Were there other assets?

A. They had no bearing on this job.

The Court: I am not asking you that. Did you have any other assets?

A. Well, there was estimates from time to time that came in from the Fort Lyon contract."

There were no assets in connection with the Fort Lyon Job over and above the liabilities. In addition to the liability of $82,771, there was the money put into the job by the Maryland Casualty Company, there was a compensation bill of the Maryland Casualty Company, a claim of $3,000 and the $5,000 advanced by B. D. Morley. The total liabilities at the time of the filing of the bill were $19,800 plus the $82,771 aforementioned.

"Now, you may tell his Honor whether or not those liabilities were liabilities covered by this bond on the Maryland Casualty Company?

Mr. Harris: Just a minute. I object to that, if the Court please, as calling for a legal conclusion of the witness.

The Court: Sustained."

On April 27th or 28th when the agreement was made, Mr. Cushwa from the home office of the Maryland and Mr. James Kelly from the Buffalo office were present. On the same day another agreement was executed on behalf of the Maryland by Kelly and on behalf of the Morley Company by H. F. Morley, this document was then marked Defendants' Exhibit 3 EFM.

By Mr. O'Donnell:

"Q. I hand you an exhibit which has been marked Defendants' Exhibit 3, and ask you to state whether or not that is a copy?

[fol. 70] Mr. O'Donnell: I understood you to admit that was a copy of the document you sent the next day, Mr. Harris?

Mr. Harris: Yes, that was signed, as I understand, and delivered to the bank at the time the account was opened. Here is the original with both signatures on it, Mr. O'Donnell.

The Court: What is that?

Mr. O'Donnell: It is the contract executed by the Morley Construction Company and the Maryland Casualty Company on April 29, 1933. We will offer it in evidence at this time we also offer Defendants' Exhibits 1 and 2.

Mr. Harris: Just a minute. We desire to object to Defendants' Exhibit 1.

The Court: Sustained.

Mr. O'Donnell: We except."

[fols. 71 & 72]

"DEFENDANTS' EXHIBIT 1"

"Bills Owed	Penalties		Claims Against Bonding Co's.		Claims Against Government	
$90,771.00	Concrete Engr. Co.	$4,000.00	Giamberdino Plast. Co. National Surety Co.	$20,000.29	Caulking Steel Wds.	$1,130.00
	McPhillips Mfg. Co.	4,000.00	Moody L. Rupp, New Amsterdam Cas. Co.	19,919.11		
			August Ohmer, New Amsterdam Cas. Co.	532.83		
			Bryce Plg & Htg. Co. Standard Accident	521.00		
$90,771.00		$8,000.00		$41,661.23		$1,130.00
8,000.00				1,130.00		
$82,771.00				$42,791.23		
			Final Check	59,760.00		
			Money in M & T Trust Co.	3,818.61		
				$106,369.84		
				82,771.00		
				$23,598.84		

Final statement of bills and claims on the Batavia, New York, job.
Dated September 17, 1934.

Morley Construction Co."

[fol. 73] Defendants' Exhibit 2 is as follows:

"DEFENDANTS' EXHIBIT 2

Batavia, New York Job Account Settled

(In pencil) since job completed	
Niedreighaus, Inc.	$1,142.35
Chamberlain Metal Weatherstrip Co.	513.00
C. H. Patek	485.23
Carl Bojohr	155.00
Rochester Cast Stone Co.	181.75
H. C. Little	59.98
Western N. W. Parlock Appliers Co.	108.58
Fairbanks Morse Co.	175.53
Lehigh Portland Cement Co.	2,262.40
Tontine Shade Co.	303.50
Truscon Laboratories	23.63
Western Union	37.75
N. Y. Telephone Co.	42.94
Sinclair Refining Co.	14.94
Enterprise Foundry Co.	13.00
Robt. McBride Boiler Works	194.23
Tuttle & Bailey	31.31
Truscon Steel Co.	31.97
Buffalo Steel Co.	2.87
Climax Corp.	1.80
	$5,781.76"

Defendants' Exhibit 3 is as follows:

"DEFENDANTS' EXHIBIT 3

Agreement

Whereas the Morley Construction Company of Kansas City, Mo., has heretofore entered into an agreement bearing date of April 28, 1933 with the Maryland Casualty Company wherein it was agreed that the Maryland Casualty Company would deposit certain moneys in the Manufacturers & Traders Trust Company in the City of Buffalo, New York to the credit of the Morley Construction Com-

pany and wherein it was agreed that the Morley Construction Company also would deposit certain moneys in said account and

Whereas pursuant to said agreement the said Maryland Casualty Company did deposit in said account the sum of Five Thousand ($5,000.00) Dollars and the Morley Construction Company deposited a like sum of Five Thousand ($5,000.00) Dollars.

[fol. 74] Now, in consideration of such payment and mutual deposits and in the further consideration of One ($1.00) Dollar it is mutually agreed as follows:

First. That all moneys deposited or to be deposited in said account shall be the joint property of the Morley Construction Company and the Maryland Casualty Company and the account shall be in all respects a joint account.

Second. It is further agreed that the original of this agreement be delivered to the said manufacturers & Traders Trust Company of Buffalo, New York and shall constitute to them a notice of the fact that the aforementioned account is a joint one and the property of the above named parties.

Morley Construction Company, by (Signed) H. F. Morley, President. Maryland Casualty Company, by (Signed) James F. Kelly.

STATE OF NEW YORK,
County of ——,
City of ——, ss:

On this 29th day of April, 1933, before me personally came H. F. Morley, to be known, who, being by me duly sworn, did depose and say that he is the President of the Morley Construction Company, the company described in and which executed the foregoing instrument; that he has the authority to sign such instruments and that he affixed his signature thereto by such authority.

(Signed) Anna M. Biere, Commr. of Deeds."

Whereupon the witness was excused.

The Court stood at recess until 1:30 o'clock of the said Thursday, September 27, 1934.

Cross-examination (continued):

Herbert F. Morley resumed the stand as witness and being further cross examined testified that the letter dated April 27th was dictated either by Mr. Kelly or Mr. Cushwa; that there had been conversation with those gentlemen telling them about the difficulties of the construction work and the letter was written thereafter. The witness was unable to recall whether the letter and the contract were signed on the same day or not, but thought that they had been. Plaintiff's Exhibit 3 was dictated either by Mr. [fol. 75] Kelly or Mr. Cushwa. Nothing was stated during the negotiations about depositing the final payment check in the joint account. The witness had a conversation with Mr. Frank Miller about the time of the filing of this suit in which Miller demanded that the final check be either turned over to him or deposited in the joint account. Miller said the agreement provided that this be done, but that the witness stated that there was no agreement calling for the final check to be deposited in Buffalo.

I told him that we had no agreement that I could see that called for that final check to be deposited up there. I also asked him if he said that they had more than one agreement. I said that I didn't have a copy of it, but that if there was a copy or a contract providing for that, if he would get it and it showed it called for us to do that, we would do it. I later found one of the supplemental agreements that we had had, but we didn't comply with his request. It intended to use the proceeds of the check to pay the labor and material bills on the job. He was in Buffalo and on the job when the estimate checks were being paid by the Government and the last estimate check was received sometime around the 15th or 20th of the month. He returned to Kansas City in September, 1933 and the last estimate check had been received before then. The office of the company was in Kansas City and the company could most conveniently handle the money from Kansas City. The office in Buffalo had been discontinued and payment could not be handled from that office. There were approximately 55 or 65 creditors. The money could not be distributed except by some one familiar with the operations and debts of the company. Neither Mr. Kelly or Mr. Cushwa could do this without the witness' help. On one

occasion the Maryland Casualty Company refused to counter-sign a check drawn on the Buffalo Bank. The construction company had a subcontractor for the plastering named Giamberdino and Sons.

"Q. I see where the petition states that they agreed to pay off plasterers' claims and also sufficient money to complete the plastering contract. Could you tell the Court the sum total of those two items, that is, the expense of this plastering contract, that is, those that had not been paid, and also sufficient to complete the plastering contract? What is the total of that, if you know?

A. Well, they paid $10,700 and some odd dollars. They paid $5,000.00 and they paid $5,740.00 toward the completion of the plastering contract.

Mr. O'Donnell:

Q. And then the Maryland Casualty further agreed to place on deposit in said account to the credit of Morley [fol. 76] Construction Company moneys to pay off plasterers' claims, which have not been paid by Giamberdino, who employed said plasterers, and also sufficient money to complete this plastering contract. Now, can you tell his Honor what the total cost of the plastering contract was?

A. Well, there is a statement there in the papers, something in excess of $17,000 was paid out, including the $5,700 that was paid out which they reimbursed us for.

Q. Well, then, can you tell his Honor how much they fell down on paying this sum, that is, how much more was due from them than they actually paid to defray the expenses of the plaster contract?

A. Approximately $12,000."

The statement referred to was based on the actual cost of completing the plastering contract. All the books that were on the job outside of the records referred to were destroyed by fire, including the Articles of Incorporation of the company. Every record on the job was destroyed, and the loss from this fire was around $5,500 or $5,600. Duplicate accounts, correspondence and bonds and contracts were procured from the other parties. Demand was made on the Maryland by the witness for them to pay the plastering. The new subcontractor was the Hudson Plas-

tering Corporation. The final bill for this plastering was $15,000 of which $7,500 was unpaid. When the witness requested Kelly to give him money to pay the first payment at the end of the first month's work by the Hudson Plastering Company, Kelly advised him to pay it out of the funds of the joint account.

"Q. Well, did he say anything as to whether he would or wouldn't carry out his contract,

A. Not at that time, no sir.

Q. Did he at any other time?

A. Yes, sir.

Q. What was it he said?

A. Well, when the next month's payment came due, the first month's payment amounted to approximately $7,500 and request was made that the money be advanced and he advised that I pay it and take care of it out of the funds of the joint account. The next month's account came due and left a balance of $2,500 on the previous month, together with about $6,000 from the ensuing month, and he suggested that I take care of that out of the funds in the joint account, and there wasn't enough money available for that so in order to keep the plastering contractor on the job and have him finish up, I did finally pay him $2,500 out of the joint account and whether at that time or within a few days after that, when I discussed it with him again, Mr. Kelly made the remark that the Maryland Casualty Com-[fol. 77] pany was not going to put any more money into that account or that job."

The witness made no further demand upon Kelly for payment.

Redirect examination:

On re-direct examination the witness testified that Defendants' Exhibit 3 was a contract left with the bank. The other one, the one consisting of two or three pages, was the contract between the two of us, the Maryland Casualty Company and the Morley Construction Company.

The claim of the Central Clay Pipe Company amounting to something less than $2,000 appearing on Plaintiff's Exhibit 1 was reduced to judgment before November 28, 1938, and he believed an execution had issued on this judg-

ment. The witness testified he did not think that there was a judgment in favor of the Dravo Equipment Company. He had signed a check and left it with Mr. Kelly to pay this account amounting to three hundred and some odd dollars. The statements given in evidence represented the accounts as of the present date. Plaintiff's Exhibit 6 was marked for identification and the witness stated that it was a statement prepared in the office on the job and given to the Maryland. The only item of consequence which had been paid was for $1,500 to the Turner Resilient Floor Company. That at the time of the conversation Cushwa and Kelly the witness testified told those gentlemen that the company was indebted to Bernard for money loaned by him to the Company from time to time. He might have stated that it was as much as $15,000 or $20,000. The witness did not at this meeting state that there was sufficient money coming from the Government to complete the Contract.

"Mr. Harris:

Q. Now, at that time, Mr. Morley, there was practically $13,500 still to become due under the plastering contract, wasn't there.

A. That was the figure that was discussed.

Q. No, I mean under the original contract.

A. On the plastering item?

Q. Yes.

A. I say that was the figure that was discussed at that time, $13,500.

Q. And that would have completed it, if it had been paid, would it not?

A. No, sir.

Q. Wasn't your contract with Mr. Hudson eventually only $14,000?

A. That was for labor only, Mr. Harris, but in that figure of $13,500, after this contract between ourselves and [fol. 78] the Maryland Casualty Company was signed, it was discovered that Mr. Giamberdino had failed to pay the material bill amounting to a little less than $3,000, which would have reduced that by that much."

That plastering contract was completed although there was extra work and extra money owing to Hudson. The

assets included a claim against Giamberdino for some $20,000. Giamberdino also has a claim against the Morley Company, but the claim by the Giamberdino against the Morley Company was not listed by the witness as a liability. We claim $19,000 due from Mr. Rupp, the grading contractor. Mr. Rupp's Estate is also claiming against us and we are claiming against him. We listed our claim against Rupp as an asset but Rupp's claim is not listed as a liability.

We have a claim against the Standard Accident Company for $500 and some dollars for material sold to some of Bryce Plumbing and Heating Company's subcontractors. The Standard Accident Company was surety on Bryce's contract to us, and we are contesting all of these claims and have not as yet brought any suit against any of these persons to establish any of our claims.

Giamberdino was placed in default in April, 1933, but no suit was brought by the construction company although the witness placed it in the hands of attorneys in Buffalo. His conversation with Mr. Miller was either a day or two before or after the suit was filed, and the final check received. He asked Mr. Miller to get a copy of the contract. He recalled Mr. Clif Johnston being at the office of the Morley Company but could not remember on what day. Bernard Morley was in Colorado during that week. He did not remember when Bernard returned, but was in the office the last of that week.

"Q. You don't recall Mr. Johnston being down there on Saturday morning and the girl telling you he was there and you sent word you could not see him, do you recall that?

A. Well, we told that to quite a few that day.

The creditors were pressing the Morley Company during this time.

How did it happen that you had $7,900.00 in the bank that you hadn't paid out if they were pressing you so hard?

A. Well, we proceeded to pay off the smaller accounts out of that fund and it didn't represent enough to take care of any of the larger ones.

Q. Isn't that what happened, Mr. Morley, didn't you tell Mr. Kelly you wanted to let that account ride as it was and wait until you got the whole amount and then try and

[fol. 79] make advantageous compromise settlements when you had the whole amount available?

A. I believe I did.

Mr. Harris:

Q. And was it intended that that whole amount should go through this account and be paid out under this joint control, was it not?

A. No.

Q. At the time it was made?

A. No, I don't think that was the intent.

As I recall it, current estimates was all that was discussed. I don't believe there was ever a word said about a final estimate. At that time we owed quite a bit.

Q. Well, anyway, at the time this letter was written, you owed $129,000.00, or approximately that?

A. Well, those figures were gone into. I don't recall just what the amount was.

Q. You say then the Maryland Casualty Company put up $5,000.00 and $5,000.00 more in the face of that $129,000.00 with the understanding that the final estimate or final money was not to go towards reduction of those bills at all, is that what the understanding was?

A. I make the statement to the best of my knowledge there was nothing discussed about any disposition of the final payment on that job.

Q. You mean it was all treated alike, it was not separated one from the other?

A. I am not saying that. I made the statement that at no time do I recall that there was ever anything said about any final payment.

Q. Was there anything said that it should not?

A. I say that there was nothing discussed about it.

Q. The only question was that the money to be received on that job was to go into this account. Now, that was discussed, wasn't it?

A. The estimates were discussed from the time we started on it.

Q. What did you mean by 'moneys'?

A. I didn't have anything to do with drawing that contract, Mr. Harris.

Q. You had something to do with signing, did you not?

A. I signed it, yes.

Q. What did you have in mind with reference to moneys when you signed that contract?

A. I covered that, I think, in my letter to the company.

Q. The letter preceded the contract.

A. It was made a part of the contract, wasn't it. They accepted it at such.

[fol. 80] Well, what I am getting at is whether they made any distinction at all between final estimate and monthly estimate and retent?

A. There wasn't anything said about it."

We asked for assistance in connection with the plastering contract. He did not ask for assistance in connection with the whole job. To the best of the witness's knowledge there was nothing discussed as to the disposition of the final payment on the job. The witness testified that he received a check about November 15th or 16th and carried it on his person. He did not notify the Maryland or the M & T Trust Company. He stated that he intended to pay it on the payment of labor and material bills.

"Q. And that is what they were doing with the money that was then in the M and T Trust Company, was it not?

A. That was going to be the eventual disposal of it.

Q. Was it your idea you would disburse it without the countersignatures of the Maryland?

A. Which money are you referring to?

Q. This $59,000.00.

A. Well, that was my idea, yes, sir."

It was his idea to disburse it without the countersignature of the Maryland. He did not think that their signature was a part of any agreement. He did not know whether he could have obtained their countersignature or not.

"Q. Well, you got their countersignature on every one you sent back except two, did you not?

Q. Isn't that right?

A. With the exception of the two, yes, sir.

Q. One of those was for attorneys' fees, was it not?

A. I think they both were.

Q. Both were for attorneys' fees?

A. Yes, sir."

The two countersignatures refused by the Maryland were both for attorneys' fees. Mr. Kelly told the witness that

the reason they were not signed was that they were not for labor and material going into the job. I do not recall them ever refusing to sign any checks except these two attorneys' fees checks.

"Q. And didn't we continually write you even after this suit, put ourselves on record that they were willing at all times to countersign them?

Q. Isn't that true?

A. We received correspondence from them, yes, sir."

After he returned to Kansas City he sent a letter to the Government to send the final payment check to the company at Kansas City. He did not send a copy of this letter to the Maryland. The total contract price of the [fol. 81] job was $543,000.00. The retent was 10%. The difference between the retent and the check in the amount of $59,780.00 was for work done after the last estimate. The $5,000 advanced by the Maryland Casualty plus the $13,000 or $13,500 due from the government would have probably been sufficient to complete the plastering contract.

Direct examination:

James F. Kelly called as a witness by plaintiff testified that he was an attorney employed in the office of the Maryland Casualty Company at Buffalo and that from April 26th, 1933 until the completion of the job. He worked on the matter in conjunction with Mr. Morley. That on the 25th of April, 1933 he and Mr. Cushwa went to Batavia and interviewed Mr. Morley in response to a request sent to the home office regarding assistance on the job. Mr. B. D. Morley was not present and the next day a second conference was had in Kelly's office. Mr. Cushwa and an attorney by the name of William Robinson were present.

"Q. You recall the letter of April 27th, which is attached to that contract?

A. Yes, sir.

Q. What had been the discussion prior to that with reference to the financial condition of the Morley Construction Company or their ability to carry forward this contract?

A. On the 25th while we were in Batavia Mr. Morley outlined the situation to us and pointed out to us the facts."

On the 25th Morley had informed us that the plasterers' situation was bad, because of a strike and that they had no money to finance the situation; that they would not be able to raise any money at all in Kansas City to finance it because they didn't know just what the extent of the situation would be; that if the Maryland did not assist them, we would have a hospital on our hands and that after further conversation the letter of the 26th was written. That both the Morleys sat in and suggested various things that should go in the letter. That Mr. Cushwa said the Maryland could not advance money unless it had control over the moneys coming due on completion of the job. The undisputed plaster claims were estimated by Mr. Morley at that time to be $7,400. We later found out they were only $5,700. We were talking in regard to the financing and paying off of those claims when Mr. Cushwa asked for joint control of the moneys coming due. Mr. Bernard Morley said that he couldn't give him the joint control of any of the moneys coming due as that would hurt their financial condition here [fol. 82] in Kansas City. He then said that if Mr. Cushwa would advance an additional $5,000.00, he then would give him, give the Maryland, joint control of all moneys due under the contract. That we agreed to do after Morley said he himself would raise $5,000.00 immediately to open the joint deposit with our account of $5,000.00. That every nickle the government was holding was to go into the joint account. The letter was written in my office, and B. D. Morley, H. F. Morley, William Robinson, my stenographer, Mr. Cushwa and myself were present. The contract (Plaintiff's Exhibit 3) was written probably an hour afterward. The thought expressed in the contract was the thought of all of us. As we would come to a particular portion of it, we would discuss it and decide how to word it. It was discussed that all moneys coming due under the contract were to be deposited in the joint account and no distinction was made between estimates and retents. Directly afterward, the letter to the Government directing it to send the drafts to the M & T Trust Company was prepared by Mr. Morley at the suggestion of Mr. Cushwa. Defendant's Exhibit 3 was drawn because the M & T Trust Company requested something in writing to show the account was a joint account.

"The Court: I would like to see their agreement.

Mr. Harris: Here is Exhibit 2, your Honor, which bears both signatures, the one submitted to the bank."

This contract was delivered to the bank purely to give the bank authority to treat it as a joint account.

The discussion as to the amount of bills payable indicated that figure to be obtained from Mr. Morley. It showed the construction company have bills payable of $126,477. It showed labor and materials complete, $12,200; balance receivable from the government, $153,090. The net result under those figures was $14,393, which with the $13,500 owing on the plastering contract would show a balance of profits of $893. That Morley told us that if we would assist in paying off the plaster claims and put $5,000 in the joint account he would put in another $5,000 and then be in a position to borrow money in the sum of approximately $20,000 in Kansas City to finance all of the other items on the job. There was nothing said about this being necessary to carry the contract forward and that where he didn't have enough to use the estimates, he would borrow the money in Kansas City. That $5,000 put in by Morley at the opening of the account was all they put in. The contract went on to completion and there was disbursements and deposits in the joint account. At the time the suit was brought around $7,000 was in the joint account. Mr. Morley and I had a conversation just before he left town and at [fols. 83 & 84] the time the last estimate, which was around $15,000 was paid. Mr. Morley told me that he desired to keep this estimate intact as much as possible to bunch it with this final estimate of $59,000 so that he could have the particular fund to say to his creditors, "I have $70,000, for example, to pay $100,000 worth of bills." And that he was coming to Kansas City and have some friend act with him to adjust those claims. Nothing was said about the money being diverted or anything else. Plaintiff's Exhibit 6 was a list of contractors and materialmen on the Batavia Job, prepared by Mr. Frizzell for me and is the very sheet given me by Frizzell. Each month I had similar sheets showing the changes.

Whereupon Plaintiff offered in evidence Plaintiff's exhibit 6, which is in words and figures as follows:

(Here follows 1 photo, side folio 85)

Page 6

Lincoln Engineering Co.	31424	1102 79	32526 79	28166	4359 79	
American Tinsa Co.	11350	0	11350	8388	2962	
Cochrane Steel Const. Co.	13000	264	13264	11	1820	
Vandergrift Steel Co.	12870	364 80	13234 80	9128	4106 80	
[illegible] Mfg. Co.	31500	806 72	32306 72	17791	14514 72	
Ridings Iron Co.	5109	126	5235	4089	1145	Paid 4/21/24 by check [illegible] 4/21/24
Roellin Iron Mfg. Co.	9300	106 20	9406 20	1404	8002 20	
Ideal Iron Metal Manufacturing Co.	1250	63	1313	900	413	
Coal & Iron Co.	150	0	150	27	123	
Bamford Iron Co. (Cleveland)	24464	648	25112	18886	6226	
Anderson Iron Co. (Lisle)	4900	0	4900	3418	1482	
Chicago Elevator Co.	125	0	125	125	0	
Olson Foundry Co.	3000	58	3058	1743	1315	
Johnson Corp. Steel Works Co.	23750	130 50	23880 50	17379	6501 50	
Iron Machine Works Co.	1311	0	1311	811	500	1500.00
[illegible] Co.	12300	94 31	12794 31	12664	130 31	Paid 4/21/13 by check dated 4/13/24 consigned 4/21/24
Steel Engineering Co.	1750	0	1750	1517	233	
Forge Co.	202 50	0	202 50	0	202 50	
American Bridge Supply Co.	1568 75	0	1568 75	0	1568 75	
Steel Works Co.	155	0	155	0	155	50.00
Steel Structural Co.	3150	0	3150	1235	2564	
[illegible] Co.	2454	154	2454	2454	0	
Iron & Steel Co.	474	0	474	153	321	
Metropolitan Safe Co.	85	0	85	85	0	
[illegible] Co.	13215	260	13545	11210	2336	
Structural Steel Co.	418	22 50	997 50	815	181 50	109.05
Engineering Co.	4150	0	4150	3416	733	
Western Steel & Tube Co.	14500	0	14500	12586	1913	
Lehigh Structural						
H. C. Little	5300	0	5300	5240	59 76	
Standard Iron Co.	5016	79	5095	3912	1183	
Hamilton Steel Co.	17700	447 78	18147 78	11666	6481 78	
[illegible] Co.	7014	337 50	7422 50	9265	1815	
Western N.Y. Structural Supplies	675	0	675	566	109	69.00
Structural Steel & Window Glass Co.	2660	152 78	2812 78	1943	868 78	
Imperial Chemical	1800	95	1895	2416		
Fairbanks Morse Co.	188	0	188	6	176	10.88
Keystone Planing & Lumber Co.	1178	50 25	1228 25	936	291	
Ray Herman	2400	0	2400	2220	180	
[illegible] Co.	7800	360	8160	7800	360	
Standard Iron & Steel Co.	625	0	625	0	625	

Western N.Y. Pa. R.R. Operators	675	0	675 00	566 00	108 00	69.00	
Wilds Blake & Bunbow Glass Co.	2682	152 79	2303 72	1905 73	548 73		
Augustus Holmes	1800	95	1895 00	2416 53			
Jabez Burke Mason Co.	188 46	0	188 46	6 72	176 46	10 00	
Neil L. Downing & Jackson Lumber Co.	1175	58 26	1221 26	936 29	291 43		
Roy Hammond	3400	0	3400 00	2264 95	1800		
[illegible] Co.	[illegible]	361	2161 00	[illegible]	1260 29		
Howard Iron & Steel Co.	625	0	625 00	0	625 00		
William Hamin	300	0	300 00	250 00	50 00		
Graham Brady & Cassan	475	0	475 00	475 00	0		
Gale Coal Co.	4000	28	4028 00	3128 00	900 00		
Universal Metal Sash Co.					875 25		
Keller Alloy Mfg. Co.					769 51		
Lehigh Portland Cement Co.					2377 00		
[illegible] Shade Shop	482 50	44 28	476 78	180 00	326 78	152 00	
[illegible]					2843	14 A	
John Schutt Jr.					172 29		
Owasco Lumber Coal Co.					362 29		
Fred Delany					374 29		
Avery Cooling Corp.					135 75		
[illegible]					1316 00		
Kendall Alloy Bucket Co.					1442 29		
Western N.Y. Tool & Die Co.					585 00		
Electrical Union					247 75		
[illegible]					64 00		
N.Y. Allegheny					14 05		
Victoria Lumber & Coal Co.					253 95		
Chas. Y. Cameron					77 85		
Keystone Refining Co.					141 29		
[illegible]					70 29		
Hallenbeck Trading Co.					30 00		
Enterprise Foundry Co.					18 00	7 00	
Rapp & Lockport Construction Co.					14 00		
Robert M. Gordon					192 29	14 30	
Walter Wright					[illegible]		
[illegible]					404 27		
Goodell & Gurney					41 00	Paid by check by mail, money [illegible] by [illegible]	
Hart & Hart Co.					144 00		
John A. Lesh & Son					28 09		
[illegible]					31 95		
Eagle Valve Co.					20 29		
Pittsburgh Steel Co.					27 00	2 07	
Niagara Lumber Co.					15 00		
Solomon & Co.					120 00	120	
					7661 09		
[illegible] (Plastic)					2794 00		
[illegible]	1390 00	121 98	1512 97	755 00	1678 97		
	[illegible]	[illegible]	[illegible]	[illegible]			
					10766 13	1072 [illegible]	

[fols. 86 & 87] Considering the Hudson Plastering it shows $107,066.23.

"Q. All of that, as I understand, is for labor and material bills?

A. Yes, with the exception of the way they set this thing up. D. Giamberdino & Sons had two payments due them, one for $4,124.04 and another of $965.38. Now, that should not appear as Giamberdino defaulted and the balance of his work was done by Hudson and it shows the amount due Hudson, so both of those should not be charged, but merely the Hudson one."

That there should be deducted about $5,000. The list did not include the $10,700 advanced by the Maryland Casualty Company. He countersigned all of the checks with the exception of one or two. The only checks not countersigned either by me or Mr. Schaus were two for attorneys' fees. He had never told the Morleys he would not sign any. This was generally handled by Mr. Morley leaving some already signed in my office and if the bill was a proper one I would countersign the check and mail it either to him or the creditor, other times, he would make out the check and mail it to me and I would mail it to the creditor. The plan of operation is practically the same since Morley came back to Kansas City.

Cross-examination:

Upon cross examination the witness testified that the contract dated the 28th designated the account as the account of the Morley Construction Company and on the next day the contract was changed to provide that the moneys deposited in the account should be the joint property of the construction company and the casualty company.

"Q. Now, in this first paragraph of this Exhibit 3, that is, the first contract dated April 28th, I find you use the language, 'The Morley Construction further agrees to deposit in said account for the benefit of said contract all moneys and estimates received from the United States Government because of said work.' You saw that word 'received' in the past tense, didn't you? Did you mean that they were depositing what they had already received or—

A. (Interrupting): All moneys they were going to get their hands on. At that time they had none.

Q. You used this word, however, in the past tense. You didn't put in 'whatever they will receive in the future'?

A. You have it there. I don't know."

The witness understood that the letter attached to the contract of April 27th was incorporated as a part of the contract to explain the situation. The letter of the 27th contained the statement "we estimate that the cost to com- [fol. 88] plete the plastering contract will be approximately $19,550," was known to the witness, and he knew that this phrase appeared therein, but he did not know how much more it cost than that figure. All the company paid was $10,700.

"Q. Well, excuse me. I think I will probably help you out. The second paragraph of this contract dated April 28th is very short and contains the following statement: 'The Maryland Casualty Company hereby agrees to deposit in said M & T Trust Company to the account of the Morley Construction Company the sum of Five Thousand ($5,000) Dollars,' and in the fifth paragraph you say: 'The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plasterers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient money to complete the Giamberardino plastering contract.'

A. Yes.

Q. So that all you did put in for the purpose of completing it was $5,700?

A. The situation——

Q. (Interrupting.) Answer the question, please.

Mr. Harris: You don't read the whole sentence. You stopped right in the middle of the sentence.

Mr. O'Donnell: I have gone as far as necessary.

Mr. Harris: If the Court please, I submit that is unfair to the witness to ask him about a sentence and stop right in the middle of a sentence.

Mr. O'Donnell: Well, I will put it in this form, I only want to get the matter straightened out."

The witness testified that in addition to the $10,700 the Maryland agreed to take care of the disputed plastering claims if the Veterans' Administration ruled that it was

necessary to pay them. They were never paid because it was ruled that the Veterans' would stand on the receipts as given by the employees. The letter to the Veterans' Administration, Plaintiff's Exhibit 4, the witness thought had been dictated by B. D. Morley, and Mr. Cushwa. At the time, Herbert Morley and the witness discussed the payment of the plasterers' bills. There was an estimate coming due on the job and the witness said to Mr. Morley, "Are you going to pay that part on the plaster contract out of the estimate, just as we understood," and Morley did so. That Morley did ask him to pay the Hudson claims and he told him to pay it out of the estimate coming due. Mr. Schaus is the Claim Manager of the Maryland Casualty in Buffalo.

Thereupon the witness was excused.

[fol. 89] HAL R. LEBRECHT called as a witness on behalf of the plaintiff testified that he was President of the Merchants Bank and was in November, 1933. The government warrant was used to purchase a cashier's check which was written up but not signed and remained in the drawer of his desk. The warrant was United States Treasury Warrant, Veterans' Administration No. 2,213,115. It appeared on the cashier's check register of the bank. The cashier's check was No. 19,519. The cashier's check had been in possession of the bank ever since, and was cancelled out because the Veterans' check was not paid. The money on the treasurer's check was never received by the bank. It was deposited in the Federal Reserve Bank on the same date which was November 22nd; Morley Construction Company had a small account which had existed prior to the formation of the Morley Construction Company.

Cross-examination:

Upon cross examination by Mr. O'Donnell the witness testified that the cashier's check was cancelled on January 4, 1934. The original voucher was returned to the Secretary of Treasury and was not returned to the bank. The Morley Corporation never had an account at the bank. He knew that the Morley Construction Company had a contract at Fort Lyon and Los Angeles.

By Mr. O'Donnell:

"Q. Do you know about when it was finished?
A. Was that the one they received a big check and paid all the bills at once.
Q. What was the check they received?
A. About $60,000."

The witness states that this check was brought down and deposited in the Merchants Bank and he issued Cashier's checks for the Morleys, and bills were paid in this manner. The Morley brothers had deposited $100,000 in the Merchants Bank since last November.

"Q. Did you ever do anything about those gentlemen running away with any money of any kind?
Mr. Harris: I object to that, if the Court please.
The Court: Sustained."

The witness stated that he had been the Morleys' banker for more than ten years. That he knew they had a contract at Fort Sill, Oklahoma.

"Q. And you may state whether or not there were any claims——

Mr. Harris (interrupting): If the Court please, I object to that."
"The Court: Sustained.
Mr. O'Donnell: We except."

[fol. 90] The witness testified that he talked to Herbert about what was to be done with the amount of the cashier's check.

"Q. What was the conversation you had with him at the time he deposited it?
Mr. Harris: We object to that as hearsay.
The Court: Sustained.

Mr. O'Donnell:

Q. Well, you may state on whose suggestion this was done, yours or his.

Mr. Harris: I object to that.
The Court: Objection sustained.
Mr. O'Donnell: Exception."

In April of 1933, he knew they had trouble with the plastering contractor and had a claim against the New Amsterdam.

"Mr. Harris: I object to that as not responsive to the question.

The Court: Sustained."

That he was preparing to lend the Morleys $10,000.

"Q. Why didn't you loan it to them?

Mr. Harris: I object to that as entirely immaterial to any issue in this case.

The Court: Sustained.

Mr. O'Donnell: We offer to prove by this witness that it was understood that if the Maryland Casualty Company had complied with this contract and put up what they had agreed and paid the plasterers' claims that this gentleman would have advanced them $10,000.

Mr. Harris: I object to the offer.

The Court: Sustained.

Mr. O'Donnell: Exception."

Thereupon the witness was excused.

GEORGE F. CUSHWA was produced as a witness on behalf of the plaintiff and testified that he was an associate manager of the Maryland Casualty Company and in the surety claims department since 1912 or 1913. His first contract with the Batavia Job was a notice to go to Buffalo, from the home office. He got in touch with Mr. Kelly and they went to Batavia—that was April 25th or 26th, 1933. The work had practically stopped when he got there. That he asked Mr. Morley how much he owed, what it would cost to complete the job and to make up an estimate.

"Mr. Harris:

Q. Did he give you that?

A. Yes, sir.

Q. Was that the statement Mr. Kelly offered here?

A. Yes."

[fol. 91] The witness testified they asked for assistance and were told by Bernard Morley that unless they got it

the Maryland would have a hospital on its hands to complete. That the Morleys stated they were unable to go ahead on account of their financial condition. He was in and out of the office while Plaintiff's Exhibit 3 was being written.

"Q. Mr. Cushwa, was there any discussion about depositing any moneys conditioned upon your doing any particular thing?

Mr. O'Donnell: If the Court please, we object for the reason that as we see it the contract is definite and they are seeking to vary a written contract. Object to it because it is incompetent.

The Court: Overruled.

Mr. O'Donnell: Exception."

There was a long talk about depositing the money in the joint account and they refused to put up any money unless the Maryland should have joint control of all moneys derived from the contract. It was agreed that the Maryland should put up $5,000 if the Morleys would put up $5,000 to be deposited in the M & T Bank under the joint control of the Maryland and the Morleys' company. It was said that all moneys would be deposited under joint control for the purpose of paying the labor and material bills in completing the contract. He had prepared the letter to the Veterans Bureau, together with Mr. Morley. He saw Herbert Morley in Washington later and Morley said it was his idea to pay all of the money derived from the contract and the moneys coming from the government and he would attempt a compromise with the creditors and save everybody from loss: He discovered through the Maryland's Washington representative that the Veterans' Bureau had mailed the check to Morley at Kansas City; that the Maryland was at all times willing to pay out the amount of the checks on debts incurred on the job. He knew that there was a suit pending in Batavia under the Hurd Act. He had received notification of claims prior to November 23, 1933.

Cross-examination:

Upon cross-examination by Mr. O'Donnell, the witness testified that when he found out the check had been sent to Kansas City he wired the Morleys to turn the check

over to Maryland. On the 25th of November, he instituted a suit in the Supreme Court of the District of Columbia and that that suit is still pending, restraining the Treasurer of the United States from paying the voucher.

[fol. 92] "Q. So that regardless of what happens to this case, it will be impossible for the Morleys to get that check as long as that suit is pending?

A. Oh, no.

Q. And the order is not set aside, isn't that right?

A. I assume that is right, but it could very easily be arranged when this is determined here."

Defendant's Exhibit 4 was then identified, was handed to the witness and the witness testified that the final settlement was made on November 9, 1935.

"Q. Then your liability under your bond, that is, the Maryland's liability under the bond or its liability to sue back in Buffalo didn't accrue until six months after November 9th, that is right, isn't it?

A. I assume that is right.

Q. And then six months after May 2nd will end the time that these people can intervene, as you understand it?

A. In the meantime, we were deluged with bills and judgments."

He did not know what the Maryland had done as to denying liability on its bond in the suit in Buffalo. I did not instruct the Maryland Casualty Company to deny liability on the bond.

By Mr. O'Donnell:

—Well, you may state as manager whether or not you were responsible for or know of any instructions given to the counsel in that case to deny liability on the ground there was collusion between the Morley Construction Company and the Government.

A. I don't know anything about that.

Q. You don't say that such an answer has not been filed?

A. I don't know anything about it.

Q. And that you say you aren't liable on that bond, is that right?

A. I didn't say that."

No bids were made by plastering contractors after Mr. Giamberardino failed to my knowledge. He had nothing

to do with the acceptance or rejection of bids made by plastering contractors after Giamberardino failed. As to payment of bills they relied as to the correctness of such bills on Mr. Morley.

"Mr. O'Donnell:

Q. Now, then, the fact is that you claim that the purpose of putting that in the joint account is so that you can supervise your employees, supervise the payment of this money.

A. Yes. If we get a bill, an itemized statement of the account and it is O. K. and the Morleys O. K. it, we O. K. it. [fol. 93] Q. That is to say, before your employees or anybody representing you can O. K. it, he must exercise his judgment and——

A. (Interrupting.) No.

Q. He has to exercise some discretion?

A. He does, yes. He is supposed to get the bills and payrolls and have them brought up by the Morleys.

Q. As a matter of fact, the Morley Construction Company in undertaking to disburse that money will have to look into it and see whether the claims are valid?

A. Yes.

Q. And if not, advise a contest of the claim and the money can't be disbursed, properly disbursed, unless both the Morleys and the Maryland Casualty Company, or somebody representing it, exercises judgment and discretion?

A. I think that is true.

Q. Isn't that right? And in addition to that, the trust Company can't honor these checks and do it properly, unless they look into it to ascertain whether or not the signatures, rather, the checks are properly executed and properly countersigned?

A. I should—yes, I would think that is a duty of a bank as to what they shall do. I can't tell you what a bank will do.

Q. That is what I mean?

A. You know that as well as I do.

Q. Now, so the record—well, I don't believe we need to put that in the record. As I understand you, then, there is a suit pending in the Federal Court in Buffalo, New York, under the Hurd law against the Maryland Casualty Company and the Morley Construction Company?

A. There is one suit and a number of intervenors, one suit has to be filed and a number of intervenors, but I don't know how many are in it, but a great many of them."

There was never any fixed amount that the Maryland Casualty Company agreed to advance on this contract. I should say $10,000.00 or $11,000.00 was about what we figure it would cost on that statement where Morley said 'this is what is would cost.' I think we put in that we could complete this contract in eight weeks of eight payrolls of $1,000.00 each. That would be eight weeks. As a matter of fact it was more than 30.

He did not suggest to the Morley that they did not need any written contract and that the advancement of the moneys could be taken care of without it. He did not know anything about the Maryland paying the overage on the [fol. 94] plastering contract, and he did not know what the word overage means.

Redirect examination:

On re-direct examination, defendant offered as part of cross examination Defendants' Exhibit 4, which is in words and figures as follows:

"DEFENDANTS' EXHIBIT 4

Veterans Administration, Washington

(Seal.) September 24, 1934.

Your File Reference: In Reply Refer to: HA

Morley Construction Company, 1643 Belleview Avenue, Kansas City, Missouri

GENTLEMEN:

Further reference is made to your letter of August 28 and acknowledgment made to your letter of September 12, 1934 relative to your request for certified copy of final settlement memorandum under your contract for construction work at Veterans' Administration Facility, Batavia,

New York. There is enclosed herewith certified copy of the final settlement memorandum in question.

Very truly yours, (Signed) L. H. Tripp, Director of Construction. P''

Enc.

CLIFFORD H. WEISS produced on behalf of Plaintiff testified that he was in charge of new accounts at the M & T Trust Company in Buffalo; that he recalled the opening of the Morley Construction—Maryland Casualty Company account. That it was opened on April 28, 1933 with $10,000 in the name of the Morley Construction Company joint with the Maryland Casualty Company. That the ledger sheet contained a record to remind the bookkeeper that checks should be countersigned by ''J. F. K.'' or ''M. C. S.'' The account continued in that name until June 21, 1933 when it was changed at the order of Morley and Kelly to joint account in the name of H. F. Morley and the Maryland Casualty Company. The original account was the Morley Construction Company alone with the countersignature. The account was an active one and deposits were $10,000 on April 28th; $5,500 on May 4, 1933; May 10 [fols. 95 & 96] $25,276.50; May 15th, $206.53; June 14th, $31,179; November 22, 1933 there was a balance in the account of $7,997.44 and the present balance is $5,424.17. That no representative from the Morley Construction Company was ever refused statements and cancelled checks of the account.

''(Mr. O'Donnell): We object for the reason that — is not shown that he is the gentleman to whom that would be presented.

The Court: Overruled. That can be brought out on cross examination.''

He stated that he did not know whether any demand had been made for the statements or cancelled checks. There was never any statement refused. I have searched the files to find out whether any demand was ever made and I found no correspondence on it at all.

Cross-examination:

On cross examination by Mr. O'Donnell thewi tness testified that the bank had about 500 employees. His title was

Chief Clerk. He did not know Morley's Superintendent, Mr. Frizzell. He was not the person in the bank to whom a customer would come to ask for cancelled checks. There was no difference in the mechanics of withdrawing money as to the first and second accounts. That a check on the money now in the bank upon being presented if in proper form would be paid and that the collection officer to whom it was presented would exercise his judgment as to whether the signatures were proper.

Plaintiff's Exhibits 9 and 10 were then offered and received in evidence and are as follows:

(Here follows 2 photos, side folios 97 and 98)

100A

97

THIS IS TO CERTIFY that [illegible] MORLEY CONSTRUCTION [illegible] adopted at a meeting of the Board of Directors of (Insert correct corporate name)

a corporation organized under the laws of [illegible] Inc. possessed and held in accordance with law and the by-laws of said corporation at the office of [illegible] Kansas City Mo. on the [illegible] day of [illegible] 19[illegible] and that such resolutions are now in full force and effect:

RESOLVED, that MANUFACTURERS AND TRADERS TRUST COMPANY, of Buffalo, N. Y., be, and hereby is designated as a depository in which the funds of this corporation may be deposited by the officers, agents and employees of [illegible]

FURTHER RESOLVED, that [illegible] be, and [illegible] hereby authorized to deposit [illegible] and to endorse [illegible] for collection, and [illegible] H.F. MORLEY - PRES. & SIGNED BY AN OFFICER OF MARYLAND CASUALTY CO.

and [illegible] of them are hereby authorized to sign checks and orders for the payment of money withdrawing funds so deposited, and that the said trust company shall be and hereby is authorized and directed to honor and pay checks, drafts, bills of exchange, acceptances, promissory notes and other orders and promises so signed, drawn, accepted or endorsed as aforesaid (including checks drawn by each or either of the authorized names of the officer signing the same) without inquiry of any kind, and shall not be responsible for the proper application of the proceeds of any such checks, notes, drafts or other instruments for the payment of money, whether payable to or tendered for deposit to the credit of or in payment of the obligations of any officer or employee of this corporation, or otherwise.

FURTHER RESOLVED, that such checks or orders may have, in lieu of the corporate title or title of the officer or officers so signing, the legend "Authorized Signature", and that specimens of the signatures of the officers above named, together with a specimen of the legend "Authorized Signature" shall be placed on file with said trust company.

FURTHER RESOLVED, that in case this corporation may request the trust company to also transact on any item or items, any officer of the corporation may execute and deliver such agreement in regard thereto as shall be required by said trust company.

FURTHER RESOLVED, that the [illegible] be, and [illegible] hereby authorized and empowered to borrow money, discount or sell, assign and deliver any of its bills, notes or accounts receivable from time to time, for and on behalf of and in the name of this corporation, and to sign, endorse, execute and deliver notes and other obligations of this corporation or any collateral held by this corporation, in such amounts, for such length of time, at such rate of interest and on such terms and conditions as the or they shall deem proper, and to pledge any bonds, stocks, bills, notes or accounts receivable, bills of lading, warehouse receipts and/or any other securities or property of this corporation as collateral security therefor, and to make such endorsements, assignments, waivers of attorney and other agreements in connection therewith as the or they may deem proper.

FURTHER RESOLVED, that any checks drawn on, and other withdrawals made from, the corporation's bank accounts heretofore, and any loans, advances heretofore had in or by the Trust Company with respect to checks or other instruments payable to the corporation, and any loans and discounts heretofore effected and at present outstanding with said trust company, and any endorsements, powers of attorney, assignments and pledges heretofore made to said trust company be, and the same are hereby ratified, approved and confirmed.

FURTHER RESOLVED, that a copy of these resolutions certified by the secretary or other officer of this corporation, together with a certificate of the secretary or other officer of this corporation authenticating the signatures of the officers of this corporation, be filed with Manufacturers and Traders Trust Company, with the definite understanding and agreement that said Manufacturers and Traders Trust Company will be promptly notified in writing from time to time of any changes or changes in said resolutions, or in the personnel of the officers authorized to act for this corporation as aforesaid.

I DO FURTHER CERTIFY that the persons whose signatures appear on the opposite side of this card have been duly elected, have qualified and are now acting as officers of the corporation in the capacity set opposite their respective names, and that their respective signatures are authentic.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said corporation this [illegible] day of [illegible] 19[illegible]

[illegible] Morley Construction Co.

[illegible]

(Seal)

F-227 CORPORATION

R

ACCT. OPENED BY

DATE APRIL 28-39

MORLEY CONSTRUCTION Co.

MANUFACTURERS AND TRADERS TRUST COMPANY

Below please find signatures of those authorized to sign checks, drafts, bills of exchange, acceptances, promissory notes and other orders and promises for the payment of money, and to transact other business for the above named company

It is understood that in receiving item for deposit or collection, this trust company acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This trust company will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This trust company or its correspondents may send items, directly or indirectly, to any bank including the payee, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this trust company not good at close of business on day deposited. The trust company reserves the right to charge the account with items of expense and service charges in connection therewith.

We declare that the certified copy of resolution contained on the reverse side of this card is embodied in the minutes of this corporation, is in conformity with the by-laws of this corporation, and is binding upon it.

In case this trust company is requested to stop payment on an item or items the depositor agrees to hold the trust company harmless for all expenses and costs incurred by the trust company in connection with refusing payment of said item, and further agrees not to hold the trust company liable on account of payment contrary to the request if such payment was made through inadvertence or accident, or if by reason of such payment other items drawn by the depositor are returned on account of insufficient funds. No stop payment request will be valid if oral, nor unless received at the office of the trust company where the account is kept

President

Vice President RESOLUTIONS - BACK OF CARD

Treasurer

Assistant Treasurer

Secretary [illegible]

Address

Assistant Secretary

Introduced by

INITIAL DEPOSIT $

F. 79 AUTHORIZED SIGNATURES OF

R.

ACCT. OPENED BY

DATE JUN 21 1933

√ H. F. MORLEY & MARYLAND CASUALTY Co.

M & T TRUST COMPANY

In receiving items for deposit or collection, this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This bank or its correspondents may send items, directly or indirectly to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited.

BOTH TO SIGN.

Signature H. F. Morley. JOINT CONTROL AGREEMENTS FILED

Signature (MARYLAND CASUALTY Co.)

THE COUNTER SIGNATURE OF MARYLAND CASUALTY CO. WILL APPEAR IN THE LOWER LEFT CORNER OF CHECKS IN THE FORM OF INITIALS AS NOTED ABOVE

Business

Address 724 M & T BLDG.

Initial Deposit $ 12.640- CH

Introduced by

Mrs. Miss Rev. Dr. Mr.

JK 10 Ed

I _____ of _____

do hereby appoint _____ of _____

Attorney, to draw and endorse checks; sign and endorse promissory notes; draw, accept and endorse bills of exchange; and to waive demand, notice and protest of all such papers; to make and execute any and all contracts; assign, pledge, sell and dispose of notes, bills, stocks, and bonds; and generally to transact any, and

all business for _____ with the

M & T TRUST COMPANY, to as full an extent as _____ could do if _____

were personally present and acting therein; hereby giving the said _____ full power,

and ratifying all _____ may do in the premises.

It is understood and agreed that this power shall stand irrevoked and in full force until notice thereof shall be given in writing

by _____ or _____

legal representative to said Bank.

IN WITNESS WHEREOF, _____ have hereunto set _____ hand this _____ day of

_____ A. D., 19____

_____ _____

Attorney.

_____ _____

Witness.

[fol. 99] J. FRANK MILLER was produced on behalf of plaintiff and testified that he was manager in Kansas City for the Maryland Casualty Company. Upon hearing of the Veterans' Bureau check having been sent to the Morley Construction Company, he called Herbert Morley on the telephone. I have known him for several years. I asked Mr. Morley if he had gotten the check and he said "Yes." I told him I wanted to know if he was going to send it back to Buffalo, and he said he couldn't tell me anything at all about it until Bernard got in town, and I told him I understood from the home office there was an agreement, that it was to go into the Buffalo bank. He said, 'I will look through my files,' so he called me back in a little while and said he found the letter, but couldn't find the contract, and if I would ask the home office to please send him a copy of that contract. He said that if the contract specified that the money was to be sent to Buffalo, he would send it back to Buffalo. In the last conversation I had with him, he said he was not going to send it back because it was a retent and not a final estimate. He did not know whether a copy of the contract was actually sent to Morley by the home office of the Maryland. He wrote a letter to the home office about the contract desired by Morley.

CLIFFORD L. JOHNSON testified upon behalf of the plaintiff that he was an insurance broker officing in the Maryland office at Kansas City and that he wrote the bond there. The first he heard about the Veterans' check was when Mr. Miller told him that if an agreement came in he wanted the witness to take it down to Morley Brothers. The next day I got in touch with you (Mr. Harris) and you had obtained the agreement by mail that morning, and I took the agreement down to Mr. H. F. Morley. That he went to the Morley office and was told by H. F. Morley that he would wait for Bernard to get back to town. He talked to Bernard on the telephone that night and asked him what he was going to do about the check. Bernard told him that he was sick and had just gotten in town that he wasn't going to do anything until he talked to his brother. The next morning he went to the offices and was unable to contact the Morleys.

I went back the next morning to find out, to tell them that you wanted to get in touch with them and that the home

office wanted to get in touch with them. They were in their office busy and couldn't be disturbed. I left word with their secretary or stenograper that it was very important that I see them, but I didn't see them. I then came [fol. 100] back to Mr. Harris' office and told him what happened. I later on tried to call them on the 'phone and couldn't get hold of them. I got word that they were busy and couldn't be talked to. That was Saturday morning, and then I went back and tried to get in touch with them around noon, but was unable to get them. I never got any response to that call.

Cross-examination:

Upon cross examination by Mr. O'Donnell he testified that he knew that they had a contract at Fort Sill at that time. He was not advised on the morning after Bernard Morley arrived that they were engaged in dealing with subcontractors on the Fort Sill Job. All he knew was that they said they were in conference and would not talk to him. He talked to Miss Merrell their stenographer.

Redirect examination:

On re-direct examination the witness stated that the Fort Sill contract was in the name of Morley Engineering and Construction Company. It originally operated as the Morley Brothers, a partnership.

James F. Kelly being recalled as a witness on behalf of plaintiff, having been previously sworn, testified that on Saturday, the 25th of November, when I received this communication from the home office of the Maryland, I called Kansas City on the telephone and asked the operator to get for me either Mr. H. F. Morley or Mr. B. D. Morley. That call was in all day. I continually called the operator to find out whether or not the Morleys would talk, and I never got them. The next day I was at my home, it being Sunday, and I had the call in all day Sunday and could not get either of the Morleys to answer my call.

PLAINTIFF'S EXHIBIT 7

"Contract and extras	$543,300.00		
"Received on contract	$390,210.00		
Balance Receivable		$153,090.00	
Bills payable	126,477.00		
Labor and material to complete	12,220.00	138,697.00	
			$14,393.00
Balance owed on plaster contract			$13,500.00
			$893.00

[fol. 101] Statement of Labor and Material to Finish

Finish wood flooring	$850.00	
Sand & Cement for cement floors	1,600.00	
Sand Cement for April	400.00	
Expansion joint to finish roads	370.00	
Coal in April	500.00	
Miscellaneous bills	500.00	
8 payrolls	8,000.00	
		$12,220.00"

Whereupon Plaintiff rested its case.

MOTION TO DISMISS

"Mr. O'Donnell: The defendants move to dismiss the bill for the reason that the evidence adduced fails to show any ground for the relief prayed for.

The Court: We will not attempt to pass upon the merits of that motion, and it is denied and overruled and exception allowed, and I will hear the whole case."

(To which ruling and action of the Court, the defendants, and each of them, by their counsel, at the time duly excepted and still except.)

Defendants' Case

BERNARD D. MORLEY, produced in behalf of defendants, upon direct examination by Mr. Ellison testified that he was a brother of H. F. Morley and was an indemnitor on the bond. The Batavia, New York Job was handled by the Morley Construction Company. The first he knew that the job was not going smoothly he received a long-distance call while he was in Colorado from H. F. Morley. That he was advised that difficulties had arisen with Giamberardino and his men, this was in April, 1933. He advised his brother that he would come to New York. He returned to Kansas City and took an airplane to Buffalo and arrived on the 24th or 25th of April. He found that Giamberardino's men had stopped work on the hospital. Giamberardino had the contract for furnishing plastering, including labor and material. The amount of the contract was in the neighborhood of $24,000, and at that time it was somewhere in the neighborhood of half through. Giamberardino was unable to complete it because he had not paid his men.

"Mr. Ellison:

Q. Why was he unable to complete it?

[fol. 102] Mr. Harris: If you know. I object to that as calling for a conclusion.

Q. Do you know?

The Court: Overruled, if you know.

A. Well, as I understand it, he was unable to complete it because his men refused to go on working for them until he paid them the money that he owed them.

Mr. Harris: I ask that be stricken out as a mere conclusion of the witness.

The Court: Sustained."

That Giamberardino wouldn't go ahead with the work, and after talking to his brother he went over to the Maryland Casualty Company where they talked with Mr. Kelly and Mr. Cushwa. That there was a general discussion as to the plasterers' claim, and the situation on the plastering contract. That Mr. Kelly and Mr. Morley agreed that the total of the plastering claims was around $11,000 or

$12,000. That Morley had two or three bids from outside contractors for the overage or additional cost to go ahead and complete the plastering contract. That they were in the neighborhood of $12,000 or $13,000. The general discussion was whether if Morley Construction Company received financial assistance in paying these claims, we could go ahead and finish the job. Mr. Cushwa asked whether if the Maryland took care of the claims filed by the Giamberardino plasterers on the original contract, the Morley Construction Company could go ahead and complete the job. That question was asked by Mr. Cushwa and Mr. Kelly, and both of us, H. F. Morley and myself, agreed that we could not go ahead and complete the job merely by the payment of the claims filed by Giamberardino's men; that there was going to be a shortage on that plastering contract that would run into quite a few thousand dollars; that we couldn't go ahead as long as that condition existed without further help. We simply said we couldn't prosecute the work under that condition unless we received additional help on it. The question of the bids and the amounts that would be necessary to complete the job was brought up and — sheet was typed by Mr. Kelly's stenographer and discussed. Finally Mr. Kelly and Mr. H. F. Morley agreed that the undisputed claims would be paid and the overage of the plastering contract that is the amount necessary to complete it over and above — was left in the Giamberardino account would be advanced, by the Maryland Casualty Company. That by overage was meant the cost of procuring another contractor to go in and complete the job, about the $24,000 in the original contract. Mr. Kelly and Mr. Cushwa agreed to [fol. 103] this but Mr. Cushwa didn't want to put it in writing. It was finally reduced to writing.

The contract was drawn up and dictated by Kelly with suggestions by Mr. Cushwa. That thereafter he went down to Batavia and stayed there approximately a week.

"Mr. Ellison:

Q. How much did they pay towards the carrying out of this agreement?

Mr. Harris: I object to that as calling for a conclusion. I have no objection to him asking how much they paid, but the purpose of it, I think is a conclusion.

Mr. Ellison: I thought I asked him how much they paid.

A. Shall I answer?

The Court: Yes.

A. They put up, as I understand it, $5,700, in conformity to that agreement, to pay the claims that we had already advanced, the money to pay Giamberardino's men, who got this money on undisputed claims for their work.

Mr. Harris: If the Court please, I ask that be stricken out as not responsive and a conclusion. The purpose of it and what he understood.

The Court: The question was how much money was paid by the Maryland Casualty Company. All of the answer excepting the answer to that question is stricken out."

Whereupon the Court stood at recess until Friday, September 28, 1934, at 9:30 a. m.

Bernard Morley resumed the stand on behalf of defendants and upon examination by Mr. Ellison testified that there was going to be $6,000 or $7,000 worth of undisputed claims. By undisputed claims was meant the claims of workmen who had not signed receipts and had not received their money that was to be paid.

"Q. What was meant by the 'disputed claims?'

Mr. Harris: Just a minute, if the Court please. I object to what was meant. I have no objection to what was said.

The Court: Sustained.

By Mr. Ellison:

Q. Were you familiar with the transactions which had caused these claims to accrue? Do you know about them, what they were of your own knowledge?

A. Yes, I knew from the discussion that went on in the office. Of course, I wasn't on the job all the time prior to that, but in getting the picture from Mr. H. F. Morley and hearing the discussion between Mr. Kelly and Mr. Cushwa and Mr. Morley, I arrived at the picture— [fol. 104] Mr. Harris (interrupting): I object to that, if the court please. If what you mean, Mr. Ellison, was that

there were certain claims that were disputed in a certain amount by reason of these receipts, or anything, I have no objection to his telling the amount if he knows it.

Mr. Ellison: That is all I meant.

Mr. Ellison:

Q. The reason I am doing this, Mr. Morley, is that in the agreement of April 28th, and in the letter which is a part of it, there is mentioned the unpaid plasterers' and laborers' bills, that is to say, $7,500, according to this letter, and then there is also mentioned some disputed bills, the laborers' claim that they had not received the full prevailing wage, although they have signed receipts for the full amount, that being said to be estimated at $5,000.

Are you familiar with the outcome of these claims; how much they eventually were?

A. Well, I know how much we paid. I know how much we actually paid out on the claims. That was somewhere in the neighborhood of $5,700. That was the actual amount that was paid out in Batavia or Buffalo; I don't know which town they were paid out in.

Q. Was that the undisputed or the disputed item?

A. That was required by the Conciliator for the Department of Labor. It was required by him; that had to be paid.

Q. What happened to the disputed claims?

A. Well, they are still up there, as far as I know. They were never paid. They never insisted upon us paying them.

Q. Well, is it true they were excused payment of them?

A. I don't know, to say we were excused. The Veterans' Bureau said we didn't have to pay them.

Mr. Harris: I object to that. I do not see the materiality of that; they were not paid.

The Court: Overruled. What did you have to do with that money, if you received it?

A. Pay the bills on the job. We never had any other intention, but to pay those bills.

The Court: That seems to be all the plaintiff wants. I do not know what we are fighting about in this case.

A. Your Honor, might I say something at this time to you?

The Court: Yes, sir.

A. I think I can give you my side of the picture or our side of this picture in a very few words. That is, with this $59,000, this final payment, and with the money in the joint account in the bank at Buffalo, and with the [fol. 105] money that should have been advanced on this plaster-s' overage, that is, the Hudson contract and the labor and the material to complete that contract, if that money had been advanced, plus the money that we could have made arrangements with the bank to borrow, every bill on that job could have been paid and would have been. But it couldn't be paid if they had the Maryland standing in there supervising everything, and if we made a deal with somebody and say we will pay you this much, we want to be able to get a check and get a release in full from that job.

Mr. Harris: If the Court please, I think that, as a matter of evidence, should be stricken.

The Court: That is not a part of the evidence; that is just a little conversation between the Court and this witness.

Mr. Harris: I have no objection to that."

The witness testified that claims had been settled on the basis of 60c cash on the dollar and giving a note for the balance; that the creditors have given them a release on their job and their claim against the bond. The money was paid out of the joint account at Buffalo and the checks made out and sent to Buffalo, and they were countersigned by Mr. Kelly or somebody in the office and the checks were paid. It was our intention in the event we were able to recover against the defaulting contractors or their sureties, to eventually pay these notes so that the creditors would be paid in full as that is the only way that we can keep on doing business, to pay those bills.

That at the meeting prior to the drawing of the contract of April 28, the Morleys had bids from various people for the completing of the plastering. They were in neighborhood of $12,000 or $13,000. It was left up to the Morleys to decide the reasonableness of these bids. These amounts were freely discussed at the meeting and the contract was drawn up the next day. That he returned from the Fort Lyons job on Friday afternoon and went to the office. He had been sick with the flu in Colorado and remained in the office about an hour and a half and then

went home. As I remember it, I believe that Mr. Johnston either called or came in. I don't remember exactly which way he did it, and said something about it. I said "I haven't had time to talk to H. F. and I don't understand about it, but I am going home, I am sick. I will talk to him or try to talk to him tomorrow" and in the morning when I came down to the office I talked to H. F. about it. I mentioned it and said "what is this trouble about the check?"

[fol. 106] At that time the Fort Sill job was just beginning and he had received notice to proceed with the work. When he arrived at the office there were ten or twelve men waiting to see him about the Fort Sill job in order to sell materials. He knew the Maryland was trying to reach them the day before, but on Saturday the only information he had was that his secretary told him there was a long distance call from New York and did not tell him who was calling. He instructed her that he was not receiving any calls. He and H. F. Morley were interviewing materialmen about the Fort Sill job. He told the Secretary that he did not want to be disturbed in order to talk to four or five men who wanted to sell him material. It was a matter of extreme urgency to get the Fort Sill job started. The amount of that job was $215,000 or $216,000. The bills were paid every month, and at the present time it is 95% completed. The contract price of the Fort Lyons Job was $331,000 and some odd hundred dollars. That job is complete. All claims on the Fort Lyons job have been settled in full, with the exception of five or six disputed bills.

"Q. Has the Morley Construction Company anything coming from that job?

A. Yes, they have three claims that have been approved by the Director of Construction in Washington of the Veterans' Administration Bureau, which are in the general accounting office and come up the second week in October.

Mr. Harris: I ask that that be stricken out.

The Court: That will be stricken. It has no bearing upon this case at all.

Mr. Ellison: We will except in so far as the complaint alleges insolvency and intent to escape payment of these bills from the Batavia job.

The Court: It alleges insolvency as of the date of the filing of the bill.

Mr. Harris: This job is not a Morley Construction Company job.

Mr. Ellison: I will withdraw the question.

A. The Fort Lyon job is a job of the Morley Construction Company, and if your Honor please, the money—I don't guess this ought to go into the evidence.

Mr. Harris: I object to his statement.

The Court: Yes.

Mr. O'Donnell: Mr. Harris went to great pains to prove how insolvent it was now.

The Court: Some of his questions indicated that, but the evidence was restricted to the date of the filing of his bill, [fol. 107] and he said in answer to the Court's question that his questions were restricted to that date.

Mr. Ellison: I understand there is no question as to its present solvency then?

The Court: I don't understand that there is.

Mr. O'Donnell: If your Honor please, you asked if there was any way to end it. We will be glad to do it. The fact is, Mr. Morley will tell you that after this suit was filed he offered to go ahead and let this money be deposited here in a joint account so they could operate, if they would dismiss their suit and they wouldn't do it. Now if something like that would happen, I don't know whether they would be willing to do that now or not.

The Court: Is that acceptable to you now?

Mr. Harris: From the very beginning we agreed that if that money would be deposited in a joint account any where to apply on these accounts, it would be satisfactory, but Mr. O'Donnell said, 'We will not do it because you have done us this damage, and we are going to hold you for damages and the injury you have done to us.' That is the only thing. I have written letter after letter making a record on this very thing, that at any time they are willing to do it——

Mr. O'Donnell: Now, if your Honor please——

Mr. Harris (interrupting): Every time the thing that has held us up is that Mr. O'Donnell says, 'We won't do it.' I even prepared a decree and submitted it to him. He said: 'You have done us a lot of damage.' I said, 'We will take

all of the sting out of that', and I prepared a decree and submitted to him to enter in this case to show we had no bad motives in tying up this money, but he insists we have damaged his client and have to pay him.

Mr. O'Donnell: The gentleman is mistaken about that. He said that he would be willing to do it if these folks would sign a release to them for having brought this suit, and I don't see why they should, if your Honor please, because it would be an admission that they had a right to charge him with what they charged him with.

Mr. Harris: Since then a half dozen times I have said, 'We will dismiss the suit and bring it any where you want to so you may have your claim against us—any claim you have—we will dismiss this suit if you will put this money any where in the United States under joint control, and we will do it.' I have told him that time and time again.

The Court: Then I don't see why you can't agree.

The Witness: If you Honor please, will you let me give you a little picture that Mr. Harris don't know about?

[fol. 108] The Court: I understand that Mr. Harris says that he is willing to dismiss this suit if this money is deposited in a joint account to be disposed of under the joint control of the plaintiff and defendants, and that he is willing to dismiss it without any restrictions upon the right of the defendants to bring any suit they want to bring, if I understood him correctly.

Mr. Harris: That is right.

Mr. O'Donnell: May we have a ten minutes' recess, your Honor to discuss this matter?

The Court: Certainly.

(Whereupon a ten minutes' recess was taken, following which the following further proceedings were had:)

Mr. O'Donnell: We have not been able to agree, if your Honor please.

Mr. Harris: I will say, if I may make the offer, if it is proper, what we are willing to do; we are willing that this fund may be deposited in any reputable bank in Kansas City, or elsewhere, to be designated by these defendants, and used for the purpose of paying bills for labor and materials on this job; that we will counter-sign any check subject to counter-signature, and we will counter-sign any check that is on a bill for labor and material that they say is a proper bill against this job.

Mr. O'Donnell: Our clients say that since the things that have developed, that they do not want any joint control.

Mr. Ellison: However, your Honor, since he has stated what they are willing to do, we offer to deposit this money in the First National Bank here or any other bank, together with a list of all the bills payable on this job, with instructions on the bank that no check should be paid except in the reduction or settlement of one of those bills, and the further provision that any expenses of prosecuting these claims against defaulting contractors or the government should also be paid from this fund.

Mr. Harris: Subject to our supervision.

Mr. Ellison: We object to the joint control.

The Court: Continue with the cross-examination of the witness.

Cross-examination:

Upon cross-examination Mr. Bernard Morley testified that when the job first started in the fall of 1932 he went to Batavia and stayed three or four weeks assisting in putting up the equipment and machinery. He then left and returned about once a month. At the time of the meeting in Buffalo, the work had not entirely stopped. There were some carpenters and some laborers working, but the plas- [fol. 109] tering work had stopped which was the main part at that time.

The Morley Construction Company was not then in a financial condition to continue the work without assistance. Morley Construction Company had no means of getting financial assistance except from the Maryland. I told Mr. Cushwa that it was either stop the job or the Maryland come in and help us. He told Mr. Cushwa that if the Maryland did not help they would have a hospital on their hand. Then this agreement as of April 28 was made. There was no understanding that all of the moneys from the job should go into the joint account.

As to what was said about whether anything should be excepted, I haven't been so positive about it. As I recall the first conversation after we had worked out the situation of what we were going to do, the question of money came up, as to who was to advance the money and how much was to be advanced and how much would be neces-

sary to complete the job, and before any agreement was made as to this additional $5,000.00, that was to be put up jointly, each one to put it up, the suggestion was made by Mr. Cushwa for Mr. Kelly, that we take the money out of the Fort Lyon job and complete the job, which I refused to sanction because the Fort Lyon job had been kept entirely separate from the Batavia job. Then the suggestion was made that I borrow money from the bank personally or else the construction company, to finish the job and I couldn't agree because they had asked that the money be put under joint control. It was the idea that the money on all the estimates should be put under joint control. The only thing that I remember about is that if the money advanced by the Maryland Casualty Company and the money we put up was going to be sufficient to pay the liabilities it was our idea at the time, and was discussed, that we would pay the final bills on the job, not the Maryland would pay the final bills, but what was being paid was being paid under the joint control of the Maryland. I don't know that it was ever agreed that any part of the money that came from the government was not to go into this joint account, and I don't recall that there was ever anything said or discussed about the final check. The only thing that was discussed was the estimate checks. That's what the main conversation was.

The only thing that was discussed were the estimate checks. They were made up by the Superintendent on the job for the Veterans' Administration. Mr. Frizzell made the preliminary statement of the work he considered done and took it to Mr. Clipman who compiled the estimate and sent it to Washington then the check came back. The check [fol. 110] involved in this case covered the final payment on the job, it was not an estimate.

Q. You know that the excess over the retent was the final estimate, don't you?

Mr. Ellison: We object his asking about an estimate when there isn't any evidence whatsoever that this last $59,000 was based upon an estimate.

Mr. Harris: Well, he is going to tell that before he gets through if you will let him alone."

The final voucher was comprised of the retent on the previous payments plus any balance that was left on the contract after extras and credits had been deducted. It was not a final estimate. The final check was computed by taking the contract price and subtracting what had been paid to the Construction Company; the difference between the retent and the amount of the check was not based on a final estimate. The Morley Construction Company owes the witness $10,000 or $12,000 for money advanced at different times to that job and the Fort Lyon job. The $5,000 deposited in the joint account was loaned by the witness. Several times prior to November 28, 1933 the witness advanced money on the job. He has advanced none since that time. He was unable to state how much. The Fort Lyon job started in January, 1933 and lasted through 1933. He had been repaid for the money advanced on that job. The Fort Sill job is 95 or 96% completed. There was no profit in the Fort Lyon job except some claims.

B. D. Morley doing business as the Morley Construction Company had a job in Idaho. There is a judgment against the Seaboard Surety Company who was surety for B. D. Morley on that job for about $7,000. The suit was not brought against Morley, but against the Seaboard Surety Company for bills of a sub-contractor.

The witness stayed in Batavia for several days after the conference and then went to Washington with Mr. Cushwa in order to get an extension of time on the job. There was a delay on the grading at the wind up of the job, but the plastering went ahead without delay. About 10 or 15 claims have been settled since the filing of this suit from the joint account. A claim against the New Amsterdam for $13,400 which was received in December, 1932 went into the job at Batavia.

Redirect examination:

The judgment mentioned by Mr. Harris in Idaho has been appealed. Defendants' Exhibit 5, a statement of the Cost of Plastering Contract to complete the work from the time of the default of the original contract. The amount [fol. 111] was $17,689.29, of which $5,746.53 was paid by the Maryland.

Defendants' Exhibit 5 was offered and received in evidence and is as follows:

"DEFENDANT'S EXHIBIT 5

Copy

D. Giamberdino & Son

Statement

August 22, 1933.

Plaster Contract	$24,450.00
Extra Work	154.60
	$24,604.60
Payments & Back charges to Apr. 14, inclusive	10,380.56
	$14,224.04

Cost of Plastering work, Apr. 14 to Aug. 22, Inclusive:

Item No.		
1	Wm. H. Robinson, Attorney	$241.50
2	Lucian F. Nowak, Stenographer	193.00
3	Photographs of Defective Plaster and Affidavits	20.50
4	452 Sks of Cement @ $.45	203.40
5	280½ Yds. Sand @ 75c	211.34
6	Batavia Lumber & Coal Co., Plaster Mt'l. for months of Apr., May, June & July	4,532.80
7	Express on Plaster Sample	.44
8	Laboratory Tests on Defective Plaster	50.00
9	Edward M. Kearney, Legal Services	3.00
10	Telegraph Charges (4/12 to 5/5)	20.18
11	8 Tons of California Stucco	332.00
12	Telephone Tolls (4/12 to 6/28)	137.77
13	James Quinn (Plastering Work)	137.50
14	Special Size Coat on Defective Plaster in Residence & Utility Bg.	369.29
15	H. F. Morley (Traveling Expenses)	24.00
16	B. D. Morley (Traveling Expenses)	200.00

"Defendant's Exhibit 5—Continued

17—Paul Squires (Cleaning Door Frames)	100.00	
18—Laney & Silvernail (Cleaning window frames)	137.60	
[fol. 112] 19—Replacing Broken Glass	180.79	
20—Lumber for Protection of Slate Treads	42.71	
21—Labor Cleaning Floors & Grounds and Patching Plaster	3,580.17	
22—Cleaning Plaster from Window Glass	275.00	
23—Hudson Plastering Co.	15,139.68	
24—Labor Claims paid by Maryland Casualty Co.	5,746.53	
25—Cleaning Supplies & Tools	30.90	
26—Genessee Lumber & Coal Co., Plaster Matl.	3.23	
		$31,913.33
		$17,689.29

Overage—Add Interest"

George A. Berry testified on behalf of defendants as follows: That he was Ex-Vice-President and Treasurer of the American Terra Cotta Company, and also a practicing attorney. That the American Terra Cotta Company had a contract with the Morley Construction Company to furnish the terra cotta on the Batavia job also on the Fort Lyon Hospital. There is approximately $3,000 still due from the Batavia job. The terra cotta company has intervened in the suit in Federal Court in Buffalo. He had seen the pleading filed by the Maryland Casualty Company in response to the suit. He has either an original or copy of this in his office in Chicago.

"Q. Now, Mr. Barry, can you tell the Court in substance what the allegations are in the document you have mentioned?

Mr. Harris: If the Court please, I object to that.

The Court: Sustained.

Mr. Ellison: We offer to prove by this witness that the answer filed by the Maryland Casualty Company in the United States Court at Buffalo, New York, denies liability upon this bond that we have mentioned in the petition here and upon which, as I understand it, they admit they are liable. We offer this for the purpose of directing the Court's attention to the fact that since a litigant must come into Court with clean hands, they should stay clean. If they take a position different in Buffalo from what they take here, it is proper to show it.

[fol. 113] Mr. Harris: We object to the offer.

The Court: Sustained.

Mr. Ellison: The only objection he is making is that it is not the best evidence.

Mr. Harris: It is not the best evidence and not the proper way of proving the contents of the writing.

Mr. Ellison: It is beyond the jurisdiction of the Court and is not here, and if I understand it, when it is beyond the jurisdiction of the Court and can't be brought in in that way, it is proper to give evidence as to what its contents are. If that is the only objection——

Mr. Harris (interrupting): And for the further objection that it is entirely immaterial and doesn't prove or tend to prove any issue in this case, if we admit in this pleading that we are liable.

The Court: I have already ruled on the objection.

Mr. Ellison: That is all, thank you, sir."

Thereupon the witness was excused.

Mr. Bernard D. Morley recalled as a witness on part of defendants testified that at the time of the conference in Buffalo H. F. Morley prepared an estimate of the cost of the completing the plastering contract. Plaintiff's Exhibit 7 where it states, "Balance owed on plastering contract $13,500." Does not mean that that is owed by the government, but that was the amount unpaid on the Giamberardino contract by the Morleys not by the government.

Redirect examination:

Bernard D. Morley upon redirect examination testified that the final amount due as shown by Exhibit 4 including retained percentage was $59,780.22.

Thereupon the witness was excused.

Herbert F. Morley resumed the stand as a witness on behalf of defendants and upon direct examination testified that Exhibit 5 was a statement of the total cost of finishing the plastering contract; it was submitted to Mr. Kelly.

Mr. O'Donnell:

"Q. And you may state whether it was accompanied by a demand that his company deposit the amount called for in this joint account?

A. I didn't get the question.

Q. You may tell the Court whether or not you demanded that he have his company deposit the same amount shown there on that list in the joint account?

A. No, sir, I did not.

Q. Why did you give it to him?

[fol. 114] A. I gave it to him at his suggestion so that we could go over and present it to the attorneys in Buffalo with the idea in mind that they would be pressing the claim against the National Surety Company.

Q. Were those charges that you understood under the contract they were to take care of by this deposit.

Mr. Harris: I object to that as a conclusion.

The Court: Sustained.

Mr. O'Donnell:

Q. You may tell his Honor how you had agreed with these gentlemen as to who would deposit the money to take care of those expenses?

Mr. Harris: If the Court please, I object to that. The written contract is the best evidence of that.

The Court: Sustained.

Mr. O'Donnell:

Q. What was your understanding of that contract with reference to that matter?

Mr. Harris: I object to that as asking for a conclusion of the witness.

The Court: Sustained.

Mr. O'Donnell:

Q. I will ask you this: Who was to determine whether or not those charges were reasonable and satisfactory?

Mr. Harris: I object to that as a conclusion.

The Court: Sustained.

Mr. O'Donnell: I offer to prove by this witness that the Morley Construction Company was to determine that fact and that they did determine that fact and so advised Mr. Kelly.

Mr. Harris: I object to that for the same reason.

The Court: Sustained.

Mr. O'Donnell: That is all."

(Witness excused.)

Whereupon, the defendants rested their case.

Mr. Harris: That is all.

Whereupon, the plaintiff rested their case.

ORDER APPROVING STATEMENT OF EVIDENCE

And the foregoing was all the evidence introduced. The foregoing narrative statement is hereby allowed and approved as true, complete and properly prepared, and is ordered to be filed and made a part of the record herein this 23rd day of September, 1935.

Merrill E. Otis, District Judge.

[fol. 115] AGREEMENT AS TO STATEMENT OF EVIDENCE

It is hereby agreed that the above and foregoing is a true and correct abstract of all the evidence in the trial of the above entitled cause.

Harris & Koontz, Attorneys for Plaintiff. Martin J. O'Donnell, Robert F. McKinstry, Andrew Ellison, Attorneys for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed October 14, 1935

For good cause shown it is ordered that the time for filing the transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit on the appeal heretofore allowed herein be, and the same is hereby extended for a period of twenty days from and after October 17, 1935.

October 14, 1935.

Merrill E. Otis, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Memorandum Opinion, Findings of Fact, Conclusions of Law, Indicated Decree—Filed October 2, 1934

Introductory

This is a proceeding in equity wherein the plaintiff having executed a surety bond for the defendant in connection with a construction contract entered into between the defendant and the United States seeks: (1) exoneration from the defendant an account of obligations under the bond to creditors of the defendant; (2) subrogation to defendant's claim against the United States by reason of alleged payments made by plaintiff to certain of defendant's creditors, and (3) specific performance of a certain contract entered into between plaintiff and defendant. The answer of the defendant to plaintiff's bill includes: (1) a motion to dismiss the bill for want of equity, (2) a denial of essential allegations of the bill, and (3) a cross-bill. The prayer of the cross-bill is that the plaintiff be required to dismiss a certain related proceeding in equity heretofore instituted by it in the Supreme Court of the District of Columbia. [fol. 116] A fuller understanding of the nature of the case will be had from a consideration of the following formal findings of fact.

Findings of Fact

1. The Morley Construction Company, a Missouri corporation, engaged in the general contracting business, on July 28, 1932, entered into a contract with the United States of America, under which is agreed to furnish all labor and material for and to fully construct and complete a veterans' hospital at Batavia, New York, for the sum of $540,300. The Maryland Casualty Company, a Maryland corporation, as surety for the Morley Construction Company, executed a bond to the United States with a penalty of $275,000, conditioned upon the completion by the Construction Company of the veterans' hospital at Batavia, New York, as provided in the contract between that company and the United States; conditioned also upon the payment by the defendant, the Construction Company, of all bills for labor and material used or consumed in the construction called for in the contract. The contract of the Construction Company with the United States has been completed and the work done accepted. The United States is indebted to the defendant under the contract in the amount of $59,780.82.

2. On or about April 27, 1933, while the Construction Company was engaged in carrying out its contract with the United States, it became involved in financial difficulties and was unable to proceed with its contract without pecuniary aid from the Casualty Company. Thereupon an agreement in writing was entered into between the Construction Company and the Casualty Company, whereby the Casualty Company agreed to advance to the defendant and to deposit in a joint account of the Casualty Company and the Consfruction Company in the M & T Trust Company, in the City of Buffalo, New York, the sum of $5,000, and the Construction Company agreed to deposit in the joint account the sum of $5,000, all sums deposited in said account to be used in completion of the contract between the Construction Company and the United States. It was further stipulated in this written agreement that the Casualty Company, in addition to the $5,000 to be deposited by it in the joint account, would advance to the defendant and deposit in the said account a sufficient sum of money to pay off all plasterers' claims unpaid and a further sufficient sum of money to complete the plastering. It was further stipulated in the said written agreement that all estimates

and moneys thereafter received from the United States by the Construction Company on the contract between that [fol. 117] company and the United States should be deposited in the joint account. It was intended and understood by the parties to the agreement and it was a part of that agreement that the moneys received from the United States to be so deposited should include the final payment under the contract made by the United States to the Construction Company, as well as all other payments under the contract made by the United States after April 27, 1933.

3. Pursuant to the agreement referred to in finding of fact No. 2, the Casualty Company and the Construction Company deposited $5,000 each in the joint account and the Casualty Company made a further deposit in the joint account of $5,700 but it did not deposit in the joint account a sufficient sum of money to complete the plastering contract. Pursuant to the agreement all money which the Construction Company received from the United States under the contract, except the final payment of $59,780.82, were deposited in the joint account. All sums so deposited, except a small unexpended balance, were used to pay labor and material bills.

4. By direction of the Construction Company and notwithstanding the agreement referred to in finding of fact No. 2, the United States sent its warrant on the treasury for $59,780.82 not to the M & T Trust Company of Buffalo as other warrants had been sent after the agreement was entered into, but to the Construction Company at Kansas City, Missouri. The warrant was by the Construction Company deposited for collection with the Merchants Bank in Kansas City. That bank was directed by the depositor to make out a cashier's check payable to H. F. Morley, trustee (H. F. Morley was President of the Construction Company) and to deliver the cashier's check to him when the government warrant had been paid and its proceeds received by the Merchants Bank. Learning these facts the Casualty Company filed in the Supreme Court of the District of Columbia a bill in equity praying an injunction restraining the treasury of the United States from paying the warrant when presented. In that proceeding a restraining order was issued which has since been and now is in force. The warrant has not been paid. The Construction Company never has received the final pay-

ment from the United States of $59,780.82 nor any part of it and cannot receive it until the restraining order issued by the Supreme Court of the District of Columbia is set aside by that court. The Casualty Company filed its bill in this case after it had filed its bill in the Supreme Court of the District of Columbia.

[fol. 118] 5. At the time the agreement referred to in finding of fact No. 2 was entered into between the Construction Company and the Casualty Company, the Construction Company was insolvent and it was insolvent when the bill in this case was filed.

6. When the bill in this case was filed there were claims against the Construction Company for labor and materials furnished on its Batavia contract in an amount exceeding $100,000, which were due and payable. The time at which suits might be independently filed against the Casualty Company as surety for the Construction Company on account of claims for unpaid labor and material bills had not yet arrived when the bill was filed.

7. While it was not the intention of the Construction Company nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in finding of fact No. 4 for any other purpose than the payment of labor and material claims on the Batavia contract, the Casualty Company had reason to apprehend that such was their intention.

Opinion

Before the trial of this case the defendant moved to dismiss the bill. That motion was overruled. The same motion renewed in the answer should be overruled. The facts pleaded in the bill, if proved, are quite sufficient to entitle the plaintiff to some equitable relief.

Three species of relief are sought by plaintiff, namely, exoneration, subrogation, and specific performance. In my view of the case, considering the facts as found, the plaintiff is not entitled to subrogation. The sum of $10,800 which it contributed to the joint bank account referred to in finding of fact No. 3 and which was used in the partial payment of claims against the defendant in reality was money loaned by the plaintiff to the defendant under the agreement referred to in finding of fact No. 1. It was not

money the plaintiff was required to pay out because of its suretyship obligation but which, to save itself from a future possible but not then existing liability on its bond to the United States, it voluntarily advanced to enable the defendant to complete its contract with the United States. Nor, in my view of the case, is the plaintiff entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. The plaintiff did not itself discharge all of its obligations under that agreement. Moreover the defendant never has received the final payment due it from the United States and could not now comply with a decree concerning the disposition of that specific fund. Specific performance is impossible.

[fol. 119] But the plaintiff is entitled to exoneration by the defendant. When its bill was filed the claims against defendant of those who had furnished labor and materials on the Batavia contract in the amount of more than $100,000 had matured and were due and payable. Immediately that became true the plaintiff's liabilities arose. Contemporaneously with the beginning of its liability its right to exoneration in equity came into being. "No principle in equity is more familiar or more firmly established than that a surety, after the debt for which he is liable has become due, without paying or being called on to pay it, may file a bill in equity in the nature of a bill quia timet to compel the principal debtor to exonerate him from liability by its payment." 21 R. C. L. 146; 50 Corpus Juris, 244.

Learned counsel for the defendant do not question the legal principle just stated. They contend, however, that because under a federal statute, U. S. C. Title 40, Sec. 270, no labor or material claimant could independently sue the plaintiff upon its bond until after six months from the completion of the contract therefore the right to exonerate did not begin until the expiration of the six months' period which in this case was subsequent to the filing of the bill. But, under the rule stated, the right to exonerate begins when liability begins. The cited statute in effect provides that the surety's liability shall begin when the principal fails promptly to pay those furnishing labor and materials.

The plaintiff then is entitled to a decree requiring the defendant to pay all labor and material claims arising in

connection with the Batavia contract for which the plaintiff is liable under its bond and to apply to such payment any money it has or will realize from assets now possessed by it, including its claims against the United States on account of that contract.

Conclusions of Law

1. Plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2.

2. Plaintiff is not entitled to a decree that it be subrogated to any part of the plaintiff's claim against the United States for the final payment due from the United States referred to in finding of fact No. 1.

3. Plaintiff is entitled to a decree requiring the defendant to pay the labor and material claims arising in connection with the Batavia contract for which the plaintiff is liable as surety and so to exonerate the plaintiff.

[fol. 120] 4. Defendant's cross-bill should be dismissed.

Exceptions Allowed

The defendant is allowed exceptions to the conclusions of law herein stated and to each of them. The plaintiff is allowed exceptions to conclusions of law Nos. 1 and 2. The defendant has filed in writing a request for conclusions of law numbers 1 to 7, inclusive. To the extent that any of these requested conclusions of law have not been given defendant is allowed an exception.

Indicated Decree

Counsel for plaintiff will prepare and submit for approval and entry a decree in conformity with the foregoing opinion, findings of fact and conclusions of law.

Merrill E. Otis, District Judge.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 121] Appearances of counsel omitted in printing.

[fol. 122] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

ORDER OF SUBMISSION—May 6, 1936

This cause having been called for hearing in its regular order, the same was argued by Mr. Martin J. O'Donnell for appellants and by Mr. Spencer F. Harris for appellee.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, with leave to appellant to file reply brief within five days.

[fol. 123] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, A. D. 1936

No. 10,477

MORLEY CONSTRUCTION COMPANY, a Corporation, and MERCHANTS BANK OF KANSAS CITY, MISSOURI, a Corporation, Appellants,

vs.

MARYLAND CASUALTY COMPANY, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Martin J. O'Donnell (Mr. William Buchholz was with him on the brief), for Appellants.

Mr. Spencer F. Harris (Mr. Paul G. Koontz was with him on the brief), for Appellee.

Before Gardner, Sanborn and Booth, Circuit Judges

OPINION—June 22, 1936

BOOTH, Circuit Judge, delivered the opinion of the Court:

This is a suit in equity brought by the Maryland Casualty Company against the Morley Construction Company and the Merchants Bank of Kansas City, Missouri. Diverse citizenship is alleged and admitted.

[fol. 124] It appears that plaintiff executed a surety bond for defendant Morley Construction Company in connection

with a construction contract entered into between said Morley Construction Company and the United States. The bond, dated on or about July 28, 1932, was in the standard form of performance bonds.

The term "defendant" hereinafter used means the Morley Construction Company.

Plaintiff seeks by its complaint the following relief: (1) exoneration by the defendant from payment of any bills for labor and materials furnished under said construction contract; (2) subrogation to defendant's claim against the United States by reason of certain payments alleged to have been made by plaintiff to creditors of the Morley Construction Company; (3) specific performance of a certain contract (Exhibit "A") entered into between plaintiff and said defendant subsequent to the making of said bond.

As to Specific Performance of Exhibit "A"

It appears that in carrying out the construction contract, the defendant, Morley Construction Company, became involved in financial difficulties, and an agreement (Exhibit "A", set out in the margin*) was entered into between it

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* "Exhibit A

Agreement

"Whereas the Morley Construction Company of Kansas City, Missouri is the General Contractor under a contract with the United States Government for the construction of the Veterans' Administration Hospital at Batavia, New York, said contract bearing date of July 23, 1932, and

"Whereas the Maryland Casualty Company executed a bond bearing date of August 1, 1932, wherein and whereby said Maryland Casualty Company guaranteed the faithful performance of the above mentioned contract, and

"Whereas the Morley Construction Company has encountered financial difficulties in the construction of said Veterans' Administration Hospital and has called upon the Maryland Casualty Company for financial assistance in regard to the completion of said contract in accordance with a letter to the Maryland Casualty Company from the Morley Construction Company bearing date of April 27, a copy of which is hereto attached and made a part of this instru-

and the Maryland Casualty Company, whereby the Casualty Company agreed to advance to the Construction Company the sum of $5000 to be placed in a joint account. The Casualty Company also agreed:

[fol. 125] "Fifth. The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plasterers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient money to complete the Giamberardino plastering contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory."

The Construction Company also agreed to place a certain amount in a joint account.

The Casualty Company did not fulfill all of the covenants assumed by it in the agreement. On cross-examination, the witness Herbert F. Morley, president of the Morley Construction Company, testified as follows:

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ment, in consideration of the mutual promises of the parties hereto it is mutually agreed as follows:

"First. The Morley Construction Company hereby agrees to deposit at the M & T Trust Company in the City of Buffalo, New York, the sum of Five Thousand ($5,000.00) Dollars and to deposit from time to time certain other sums of money to be used toward the completion of said contract. The Morley Construction Company further agrees to deposit in said account for the benefit of said contract all moneys and estimates received from the United States Government because of said work.

"Second. The Maryland Casualty Company hereby agrees to deposit in said M & T Trust Company to the account of the Morley Construction Company the sum of Five Thousand ($5,000) Dollars.

"Third. It is mutually understood and agreed that the said Maryland Casualty Company shall have joint control of all moneys deposited in said account and that no check, draft or withdrawal order shall be drawn on said account and paid by said bank without the approval of the said Maryland Casualty Company by its representatives, James F. Kelly and/or Martin C. Schaus, said approval to be designated on said check, draft or withdrawal order by the

"Q. I see where the petition states that they agreed to pay off plasterers' claims and also sufficient money to complete the plastering contract. Could you tell the Court the sum total of those two items, that is, the expense of this [fol. 126] plastering contract, that is, those that had not been paid, and also sufficient to complete the plastering contract? What is the total of that, if you know?

"A. Well, they paid $10,700 and some odd dollars. They paid $5,000.00 and they paid $5,740.00 toward the completion of the plastering contract. • • •

"Demand was made on the Maryland by the witness for them to pay the plastering. The new subcontractor was the Hudson Plastering Corporation. The final bill for this plastering was $15,000 of which $7,500 was unpaid. When the witness requested Kelly to give him money to pay the first payment at the end of the first month's work by the Hudson Plastering Company, Kelly advised him to pay it out of the funds of the joint account.

"Q. Well, did he say anything as to whether he would or wouldn't carry out his contract?

"A. Not at that time, no, sir.

"Q. Did he at any other time?

"A. Yes, sir.

"Q. What was it he said?

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initials of the above individuals, to-wit, J. F. K and/or M. C. S.

"Fourth. The Morley Construction Company hereby agrees to pay back to the Maryland Casualty Company the aforementioned sum of Five Thousand ($5,000.00) Dollars out of the proceeds of said job if there be sufficient money and if not, they thereby bind themselves and agree to pay said money themselves to the Maryland Casualty Company.

"Fifth. The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plasterers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient money to complete the Giamberardino plastering contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory.

"A. Well, when the next month's payment came due, the first month's payment amounted to approximately $7,500 and request was made that the money be advanced and he advised that I pay it and take care of it out of the funds of the joint account. The next month's account came due and left a balance of $2,500 on the previous month, together with about $6,000 from the ensuing month, and he suggested that I take care of that out of the funds in the joint account, and there wasn't enough money available for that, so in order to keep the plastering contractor on the job and have him finish up, I did finally pay him $2,500 out of the joint account and whether at that time or within a few days after that, when I discussed it with him again, Mr. Kelly made the remark that the Maryland Casualty Company was not going to put any more money into that account or that job.

"(The witness made no further demand upon Kelly for payment.)"

The witness Kelly, an attorney employed in the office of the Casualty Company at Buffalo, New York, testified as follows:

"In addition to the $10,700 the Maryland agreed to take care of the disputed plastering claims if the Veterans' Ad- [fol. 127] ministration ruled that it was necessary to pay

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"Sixth. The Morley Construction Company hereby agrees to pay to the Maryland Casualty Company any and all moneys advanced to them for payment of plasterers' claims or other laborers' claims on the D. Giamberardino & Sons contract and any and all moneys advanced by the said Maryland Casualty Company to assist in the completion of the D. Giamberardino & Sons contract.

"Seventh. The Morley Construction Company hereby agrees to give a note in the sum of Five Thousand ($5,000.00) Dollars bearing even date of this instrument to the Maryland Casualty Company as security to them for the payment of the sum of Five Thousand ($5,000.00) Dollars mentioned in Paragraphs Second and Fourth in this instrument.

"Dated April 28, 1933.

Morley Construction Company, by H. F. Morley, President. Maryland Casualty Company, by James F. Kelly."

them. They were never paid because it was ruled that the Veterans' would stand on the receipts as given by the employees. The letter to the Veterans' Administration, Plaintiff's Exhibit 4, the witness thought had been dictated by B. D. Morley, and Mr. Cushwa. At the time, Herbert Morley and the witness discussed the payment of the plasterers' bills. There was an estimate coming due on the job and the witness said to Mr. Morley, 'Are you going to pay that part on the plaster contract out of the estimate, just as we understood,' and Morley did so. That Morley did ask him to pay the Hudson claims and he told him to pay it out of the estimate coming due."

The Court found as to this matter as follows:

"It was further stipulated in this written agreement that the Casualty Company, in addition to the $5,000 to be deposited by it in the joint account, would advance to the defendant and deposit in the said account a sufficient sum of money to pay off all plasterers' claims unpaid and a further sufficient sum of money to complete the plastering. * * *

"Pursuant to the agreement referred to in finding of fact No. 2, the Casualty Company and the Construction Company deposited $5,000 each in the joint account and the Casualty Company made a further deposit in the joint account of $5,700 but it did not deposit in the joint account a sufficient sum of money to complete the plastering contract."

As Conclusions of Law the Court found:

"Plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. * * *."

We cannot agree with this Conclusion of the trial Court.

Acquiescence by defendant in a modification of the contract, Exhibit "A", which modification was thereafter carried out, deprives the conduct of the plaintiff of any taint of inequity. Becker v. Becker, 250 Ill. 117, 95 N. E. 70; Langley v. Devlin, 95 Wash. 171, 163 Pac. 395.

Such acquiescence, we think, was shown by the evidence in the case at bar.

[fol. 128] We do not wish it to be thought that we are departing from the well-established rules regarding the

granting of the remedy of specific performance. Such is not our intention.

This Court, in Shubert v. Woodward, 167 F. 47, has said (p. 54):

"The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules, and practice of equity jurisprudence. Hennessey v. Woolworth, 128 U. S. 442, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules and this practice hard, fast or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience of the chancellor. Yet these principles and rules and this practice serve to inform the intellect and to enlighten the conscience, and by them the judicial discretion of the court must be guided."

In Town of Glenwood Springs v. Glenwood Light & W. Co., 202 F. 678, this Court lays down the rule (p. 684):

"And courts of equity will not ordinarily compel the specific performance of a contract, either by decree or by an injunction against its violation, at the suit of a party who is guilty of a *substantial* breach of it." (Italics supplied.)

In Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co., 11 F. 284 (C. C. A. 8), the Court states the rule as follows:

"A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of *bad faith, fraud,* or any *unconscionable act* in the transaction which forms the basis of his suit." (Italics supplied.)

We think relief can be granted in the case at bar without doing violence to the foregoing rules.

[fol. 129] The breach of the contract (Exhibit "A") on the part of plaintiff, which defendant alleges precludes plaintiff from obtaining the remedy of specific performance, is the failure by plaintiff Casualty Company to deposit in the joint account agreed upon in said contract, Exhibit "A", sufficient moneys to pay for completing the plastering contract. There was deposited in the joint account by plaintiff the sum of $10,700, but this was not sufficient to pay in full the amount due or to become due for plastering.

Defendant makes these allegations in its answer:

"Defendant admits that the plaintiff deposited in said account a total of Ten Thousand Seven Hundred ($10,700) Dollars, but states that said sum was Seventy-eight Hundred ($7,800) Dollars less than the said plaintiff had so promised and agreed to deposit, and said plaintiff thereby breached said contract and thereby forfeited all rights thereunder.

"* * * but the said defendant alleges that the plaintiff, in part performance only of the said supplemental contract deposited the said sum of Ten Thousand Seven Hundred ($10,700.00) Dollars and refused to deposit the further sum of Seventy-eight Hundred ($7,800) Dollars, under and by virtue of the said contract and that for said reason the said contract was broken by the said plaintiff to the great damage of the defendant Morley Construction Company."

We have set out heretofore the testimony of the witnesses Herbert F. Morley and Kelly relative to this alleged breach. The testimony may be sufficient to show that plaintiff Company did not strictly fulfill its agreement as to the amount of its deposit in the joint account.

But other considerations must be kept in mind. The Morley Construction Company was insolvent. The contract, Exhibit "A", was entered into for the purpose of extricating the defendant Morley Construction Company from financial difficulties in connection with the construction contract, and for completing the construction contract. This was the purpose of establishing the joint account provided for in Exhibit "A". This purpose was accomplished. The construction contract was completed to the satisfaction of the United States Government, and final payment ordered.

There were facts which led the Casualty Company to be-
[fol. 130] lieve the Morley Construction Company did not intend to use the funds coming from the United States Government in the payment for labor and materials used on the construction contract.

There is no sufficient showing that the failure of plaintiff to deposit the full amount promised caused any delay or resulted in any damage to Defendant Company. On the contrary, at the time of answering by defendant in the present suit, the joint account established by Exhibit "A" still had in it, according to the allegations of the answer, the sum of $7,900.

It may be noted that the sixth clause of Exhibit "A" provides:

"Sixth. The Morley Construction Company hereby agrees to pay to the Maryland Casualty Company any and all moneys advanced to them for payment of plasterers' claims or other laborers' claims on the D. Giamberardino & Sons contract and any and all moneys advanced by the said Maryland Casualty Company to assist in the completion of the D. Giamberardino & Sons contract."

It should also be noted as perhaps illuminating the situation, that Herbert F. Morley testified as follows:

"The creditors were pressing the Morley Company during this time.

"Q. How did it happen that you had $7,900.00 in the bank that you hadn't paid out if they were pressing you so hard?

"A. Well, we proceeded to pay off the smaller accounts out of that fund and it didn't represent enough to take care of any of the larger ones.

"Q. Isn't that what happened, Mr. Morley, didn't you tell Mr. Kelly you wanted to let that account ride as it was and wait until you got the whole amount and then try and make advantageous compromise settlements when you had the whole amount available?

A. I believe I did."

When the whole of the evidence is examined closely, we do not find any unconscionable or fraudulent act on the part of plaintiff; nor do we think that the failure of the plaintiff to fulfill its obligation under Exhibit "A" with strictness, precludes it, under all the circumstances, from asking relief

[fol. 131] in the case at bar by way of specific performance, or that the Court will abuse its discretion in granting the same.

Nor do we think a decree for specific performance of the contract, Exhibit "A", is impossible of being carried out.

A court of equity should mould its decree to meet the exigencies of the situation.

What the plaintiff is seeking by its present complaint is to have the moneys still coming to defendant under the construction contract applied to payment of bills for labor and materials furnished for the completion of the construction.

The circumstances appearing in the record warrant such an application.

That such moneys come within the provisions of the contract, Exhibit "A", we think too clear for argument.

An injunction against using the moneys except as agreed upon, and an order to place said moneys when received in the joint account and disburse the same in payment of just claims for labor or materials, would meet the requirements and rights of plaintiff and would not be impossible of performance.

We think a decree along such lines should be granted by the trial court.

As to Exoneration

The trial court denied the relief of specific performance and granted the relief of exoneration.

We are in grave doubt whether exoneration can properly be granted.

In 50 C. J., p. 244, the statement is made:

"Before maturity of the debt or accrual of liability the surety has no right of action in equity to be indemnified against apprehended danger of loss by reason of his undertaking."

It would seem from this statement that there can be no exoneration except from an existing liability against the surety. This is also the result of the cases as we read them. [fol. 132] Ordinarily the liability of the principal and the liability of the surety arise at the same time; and the cases hold that when the liability arises, the surety may sue for exoneration; but this is on the assumption that the liability

of the principal and the liability of the surety arise at the same time.

In the case at bar the situation is different. The liability of the principal arises, in the absence of special agreement, when the labor or materials are furnished.

But a Statute (40 U. S. C. A., Sec. 270) controls the beginning of the liability of the surety.. The Statute provides, among other things, as follows:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later * * *."

This Statute has been construed to the effect that there is no liability or cause of action against the surety until the expiration of the six months mentioned. Texas Cement Co. v. McCord, 233 U. S. 157; Stitzer v. United States, 182 F. 513; People v. Metropolitan Surety Co., 211 N. Y. 107. [fol. 133] In the McCord case the Court used the following language (p. 162):

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon a

cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

In the Metropolitan Surety Company case, the Court said (p. 114):

"Obviously the entire liability of the surety company to the claimant for the materials furnished by it under the contract between it and the Church Construction Company arises through the execution of the bond by the surety company as a surety for the construction company. The claimant could reach the surety company through the bond alone, which, with the statute as a part of it, defines and limits the rights of the claimant as against it, and the method and tribunals through which those rights might be enforced. His right of action against it through any form of legal proceeding was created by the bond and the statute, and must be enforced pursuant to the terms and conditions of the statute and not otherwise. (Stitzer v. United States, 182 Fed. Rep. 531; United States v. Boomer, 183 Fed. Rep. 726; Baker Contract Co. v. United States, 204 Fed. Rep. 390.) It was, however, a qualified and conditional, and not an absolute right or cause of action. An act of Congress, which at the same time and in itself authorizes or creates a new cause of action and prescribes the limitations thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an act is not a statute of limi-
[fol. 134] tations, and a compliance with the conditions which it pre-
scribes is indispensable to the enforcement of the right it creates, because they are parts of or elements in the right itself and not limitations of the remedy only. The limitation of the remedy is a limitation to the right."

It would seem to follow from these authorities that there was no liability on the part of the surety in the case at bar until the expiration of the six months' period. This being

the situation, there was nothing from which the surety could be exonerated prior to the expiration of that period, and any suit prior to that time would be premature.

It is conceded that the six months' period had not expired in the case at bar.

For this reason, we have preferred not to place the relief to be granted on the basis of exoneration, but rather on the basis of specific performance of the agreement, Exhibit "A".

As to the Matter of Subrogation

This form of relief seems not to be pressed on the present appeal. Furthermore, we think the trial Court was correct in its disposition of this matter, and, therefore, discussion is pretermitted.

The case is accordingly remanded for modification of the decree in accordance with the foregoing views, and as so modified, the decree is Affirmed.

[fol. 135] In United States Circuit Court of Appeals, Eighth Circuit

No. 10477

Morley Construction Company and Merchants Bank of Kansas City, Missouri, Appellants,

vs.

The Maryland Casualty Company, a Corporation

Decree—June 22, 1936

Appeal from the District Court of the United States for the Western District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that this cause, be, and the same is hereby, remanded to the said District Court with directions for modification of its decree in accordance

with the views expressed in the opinion of this Court, and as so modified the said decree is by this Court hereby affirmed.

It is further ordered by this Court that The Maryland Casualty Company, a Corporation, have and recover against the Morley Construction Company and Merchants Bank of Kansas City, Missouri, the sum of Twenty Dollars for its costs herein and have execution therefor.

And it is further ordered by this Court that a copy of the opinion filed herein be transmitted with the mandate to the said District Court.

June 22, 1936.

[fols. 136-148] Petition for rehearing, covering 13 pages, filed July 7, 1936, omitted from this print. It was denied and nothing more by order of July 20, 1936.

[fol. 149] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—July 20, 1936

The petition for rehearing filed by counsel for appellants having been considered, It is now here ordered by the Court that the same be, and it is hereby, denied.

July 20, 1936.

In United States Circuit Court of Appeals

Motion of Appellants for Stay of Issuance of Mandate—Filed July 30, 1936

And now again come appellants and respectfully show to the court that they desire to have the opinion and decision in this court and cause reviewed on certiorari by the Supreme Court of the United States in accordance with the statutes and rules of court in such cases made and provided upon the ground, among others, of conflict between the opinion and decision herein and the decisions of the Circuit Courts of Appeal for other circuits and decisions of the

Supreme Court of the United States and the general law on the question.

Wherefore, the said appellants respectfully pray this Honorable Court to make its order staying the issuance of the mandate for thirty days, in accordance with the rule of this court in such case made and provided.

William Buchholz & Martin J. O'Donnell, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 150] In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—August 3, 1936

On Consideration of the motion of appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is herby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 3, 1936.

[fol. 151] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 152] Supreme Court of the United States

Order Allowing Certiorari—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified

copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter William Buchholz. File No. 40,865. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 325. Morley Construction Company et al., petitioners, vs. Maryland Casualty Company. Petition for writ of certiorari and exhibit thereto. Filed August 31, 1936. Term No. 325, O. T., 1936.

FILE COPY

Supreme Court, U.S.
FILED
DEC 9 1936
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

October Term, 1936.

No. 325

Monarch Conservatories Company, a Corporation, and Maynard Starr, of Kansas City, Missouri, a Corporation, *Petitioners*,

vs.

Mayflower Creamery Company, a Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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III. Respondent having violated the maxim that he who seeks equity must do equity and that he who seeks equity must come with clean hands in that it had, though requested so to do, deliberately and intentionally refused to carry out its contract to deposit enough money in the M. & T. Trust Co. account to complete the plastering contract and the trial court having so found as a fact from the evidence before it and after having seen the witnesses and the parties and their counsel the act of the Court of Appeals in rendering its decree directing the trial court on remand to grant the relief of specific performance declared the law directly contrary to the way in which it has been declared by this and all the other courts..... 31

V. The contract as a whole undertook to assign a joint interest to the Maryland Casualty Company of all claims which the Construction Company might thereafter have against the Government arising out of the Batavia contract and was therefore void under the provisions of Section 203, Title 31, U. S. C. A..... 35

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VII. Respondent had no right to have the check or warrant impressed with a trust in its favor or in favor of persons supplying labor and materials since said check or warrant was received in the ordinary course of the contractor's business and constituted part of its resources in executing its contract with the United States. The statute prohibiting the assignment of claims against the Government denies such asserted right to respondent 39

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In the Supreme Court of the United States

October Term, 1936.

No.....

MORLEY CONSTRUCTION COMPANY, a Corporation, and MERCHANTS BANK OF KANSAS CITY, MISSOURI, a Corporation, *Petitioners,*

vs.

MARYLAND CASUALTY COMPANY, a Corporation, *Respondent.*

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully say:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Morley Construction Company, a corporation, entered into a contract with the United States Government to construct a Veterans hospital in the vicinity of Batavia, New York, for the sum of $540,000.00. The Maryland Casualty

Company, a corporation, and Surety Company, with the Construction Company, executed the performance bond (standard form), of $275,000.00 on July 28, 1932.

Morley Construction Company immediately engaged in the performance of the work. Thereafter due to labor troubles and the general banking situation early in 1933 and the failure of sub-contractors to perform their contracts and its financial condition the Construction Company could not proceed with the work. Thereupon and on the 28th day of April, officials of Morley Construction Company met with the Maryland Casualty Company's officials at Buffalo, New York, and entered into a contract to open a joint account which contract consisted of three documents all executed at the same time (R. 69). These documents consist of Exhibits "A" (R. 9), "B" (R. 11) and defendant's Exhibit 3 (R. 73-74). By the contract as expressed in these documents the Surety Company and its principal agreed that Morley Construction Company would open an account in a bank known as the M. & T. Trust Company, of Buffalo, New York, each depositing the sum of five thousand ($5,000.00) dollars to open it; that the Construction Company would deposit thereafter all moneys and checks received from the Government because of said work in said joint account and that the Maryland Casualty Company and the Construction Company would jointly own all sums deposited in said account (R. 74). It was also agreed that all checks on said joint account drawn by the Construction Company should be countersigned by the Surety Company's representatives. (R. 10.) It was also agreed that the Surety Company should (in addition to the initial deposit) deposit a sufficient sum of money to pay off all plasterers' claims unpaid and sufficient money to complete the plastering contract. (See Bill of Complaint, pp. 3-4.)

On June 21, 1933, the parties modified the agreement contained in Exhibits "A" and "B" and defendant's Exhibit 3. The parties then changed the account to a joint account in the names of H. F. Morley and the Maryland Casualty Company. The original account was that of the Morley Construction Company alone, with a countersignature. (R. 94-97-98.)

The Morley Construction Company thereafter proceeded with the work, completed the building, made a final settlement with the Government on November 9, 1933 (R. 92). The Maryland Casualty Company failed to deposit in the joint account sufficient money to complete the plastering contract as agreed by it. (R. 76-118.)

After the completion of the building Morley Construction Company and its officials left New York state and went to Kansas City, Missouri, their home. The balance found to be due by the final settlement, amounting to $59,780.82 (R. 7), a check or voucher for said amount was sent to the Construction Company by the Government and said voucher was given by the president of the Construction Company to petitioner Merchants Bank of Kansas City for the purpose of collection under an understanding that when collected the president (as trustee) should receive a cashier's check for the amount. The voucher was deposited by the Merchants Bank in the Federal Reserve Bank, but before it was paid the Casualty Company filed a suit in the Supreme Court of the District of Columbia and caused process to be served on the treasurer of the United States and an order made by said court in obedience to which the treasurer refused to pay the amount of the check or voucher. Two days afterwards and on the 27th of November, 1933, the Maryland Casualty Company filed its bill of complaint in the U. S. District Court at Kansas City, and later on March 3, 1933, filed an amended bill of com-

plaint in the United States District Court at Kansas City, Missouri (R. 13), in which it asked for the relief of specific performance of the contract entered into in April, 1933, between the parties and also subrogation and exoneration as surety.

In the bill of complaint the Casualty Company claimed that the Construction Company and its officers intended to use the proceeds of the voucher due from the Government for purposes other than paying labor and material claims and that they intended to conceal or fraudulently convey the same. (R. 7.)

Petitioners filed their joint and separate motion to dismiss answer and counterclaim on January 5, 1934, and refiled same on September 27, 1934. (R. 13-29.) The motion to dismiss was made on the grounds that the complaint in equity failed to state facts sufficient to constitute a cause of action or basis for relief against the defendants, or either of them.

The answer also alleged that Maryland Casualty Company had breached its alleged contract and forfeited all rights thereunder to have the amount of the voucher thereunder deposited and called attention to the failure of the bill of complaint to allege performance of the contract which the Maryland Casualty Company sought to have enforced and denied that the claim of the Construction Company for the amount due from the Government was or could be impressed with a lien or trust in favor of the Maryland Casualty Company. Also pointed out that the time given by the statute for the performance of the obligations of the contract and bond to pay laborers and materialmen had not expired when the suits were brought by the Maryland Casualty Company and that its acts prevented the Construction Company from collecting its obligations and paying its debts. (R. 21.) The counterclaim prayed that

the court direct the Casualty Company to dismiss its suit in the Supreme Court in the District of Columbia. (R. 21-22.)

The Maryland Casualty Company filed a reply on September 18, 1934 (R. 35), and an answer to the counterclaim. In said reply, amongst other things, the Maryland Casualty Company alleged:

> "* * * that the sole purpose of plaintiff's complaint is to require the defendants to deposit said money and to require its disbursement in accordance with said alleged contract." (R. 33.)

The cause was called for trial on September 27, 1934, by the District Court. (R. 54.) At the trial Maryland Casualty Company called the president of defendant Construction Company to the stand and his testimony established that the total amount of the assets over the obligations of Morley Construction Company was $23,598.84; that some of the assets consisted of claims against the defaulting bonding companies of sub-contractors; that the Construction Company had two claims against the New Amsterdam Casualty Company, one amounting to $19,919.11 and the other in the amount of $532.83; a claim against the Standard Accident Company in the amount of $521.00 and against the National Surety Company in the amount of $20,689.29. (R. 68.) The total amount of claims to be collected amounted to $42,791.23. The Construction Company desired to be permitted to collect those claims and to collect the amount due from the Government in addition, amounting to $59,780.82.

The evidence disclosed without contradiction that the Construction Company was endeavoring to complete its contract to pay the laborers and materialmen, as it had completed the contract to the satisfaction of the Govern-

ment with reference to that feature of the contract and that the acts of Maryland Casualty Company in bringing the suits in question had prevented it from collecting its debts and discharging its obligations. After hearing the evidence the trial court filed a memorandum opinion, findings of fact, conclusions of law and indicated decree. (R. 115-120.) The court found that:

> "* * * it was not the intention of the Construction Company nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in Finding of Fact No. 4 for any other purpose than the payment of labor and material claims on the Batavia contract." (R. 118.)

It found also that:

> "The Construction Company never has received the final payment from the United States of $59,780.82 nor any part of it and cannot receive it until the restraining order issued by the Supreme Court of the District of Columbia is set aside by that court. The Casualty Company filed its bill in this case after it had filed its bill in the Supreme Court of the District of Columbia." (R. 117.)

The court also found,

> "Pursuant to the agreement all money which the Construction Company received from the United States under the contract, except the final payment of $59,780.82, were deposited in the joint account." (R. 117.)

The court further found that it was provided by the written agreement that Maryland Casualty Company would advance to the Construction Company and deposit in the said joint account a sufficient sum of money to pay off all

plasterers' claims unpaid and a further sufficient sum of money to complete the plastering. (R. 116.) The court also found that the time at which suits might be independently filed against Maryland Casualty Company, as surety for the Construction Company, on account of claims for unpaid labor and material bills

> "* * * had not yet arrived when the bill was filed." (R. 118.)

The court further found:

> "The Casualty Company did not itself discharge all of its obligations under that agreement." (R. 118.)

And that the Casualty Company was not entitled to a degree of specific performance or to the relief of subrogation. (R. 118.) It filed conclusions of law to this effect. (R. 119.) It found that the Construction Company was insolvent. (R. 118.) It, however, found that the Maryland Casualty Company was entitled to the relief of exoneration by defendant Construction Company. It found that the cross-bill should be dismissed. (R. 120.) A decree was thereafter filed. It rendered a decree giving effect to these findings of fact and conclusions of law. (R. 35-37.) This decree required the Construction Company to deposit the proceeds of the voucher, to-wit: $59,780.82, in some bank and to be designated a special trust fund for the payment of labor and materials on the Batavia contract, and to use:

> "All other assets of defendant Morley Construction Company which it now has or may hereafter acquire"

for the payment of the labor and material claims on the Batavia contract. An appeal from the decree was taken

to the United States Circuit Court of Appeals for the 8th Circuit. (R. 24.) The cause was argued on May 6th in that court and on the 22d of June, 1936, the court filed an opinion (R. 122, 132), together with its decree (R. 132-133), in which it directed that the cause be remanded to the District Court with directions for modification of the decree in accordance with the views expressed in the opinion of the court and as so modified the decree was affirmed.

The opinion of the court discloses that notwithstanding the trial court found against Maryland Casualty Company on the issue with reference to specific performance and that that company had failed to prosecute an appeal or cross-appeal from the decision against it and had failed to assign cross-errors and that Maryland Casualty Company had breached the contract it sought to have performed, yet the court of appeals held that the District Court was in error in denying the relief of specific performance and that it should have granted the relief of specific performance and in the opinion directed that the cause be remanded and the relief of specific performance granted to Maryland Casualty Company by the District Court on remand. The Court of Appeals also found that the trial court erred in granting the relief of exoneration to the surety upon the ground that it was not liable at the time the bill was filed and consequently was not entitled to the relief of exoneration.

Thereafter and in due time, to-wit: on July 7, 1936, petitioners filed a petition for rehearing (R. 147). Said petition for rehearing is found at R. 135 to 147. Thereafter and on July 20th, said petition for rehearing was denied. (R. 147.) Thereafter, the motion for stay of issuance of mandate was filed (R. 147-148) on July 30, 1936, and on August 3, 1936, an order staying the issuance of the mandate was made for thirty days.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The fact that the Construction Company's entire assets were tied up by the decrees of the courts below and by the suits in the District of Columbia and Kansas City brought by the Maryland Casualty Company nearly six months before its liability could accrue on the performance bond caused a loss to the Morley Construction Company in excess of forty-two thousand ($42,000.00) dollars by preventing it from realizing on its claims against the bonding companies of subcontractors and others and in effect deprived it of its property contrary to the command of the Fifth Amendment and it was unjust and inequitable under all the authorities and unless the Construction Company can get relief in this court it will sustain such a total loss. *Fidelity & Deposit Company* v. *Buckley,* 75 N. H. 506.

II.

The contract consisting of the three instruments executed on April 28, 1933, Exhibits A, B and Defendant's Exhibit 3 (R. 74), was a contract by virtue of which the Maryland Casualty Company sought to acquire by transfer or assignment an interest in a claim against the Government, in violation of Section 203, Title 31, U. S. C. A. As the contract was illegal and void it cannot be enforced and the opinion and decision of the Court of Appeals is in conflict with the following opinions of this court:

National Bank of Commerce v. *Downie,* 218 U. S. 345, 54 Law Ed. 1065;
Spofford v. *Kirk,* 97 U. S. 484, 24 L. Ed. 1032;
American Surety Co. v. *U. S.,* 76 Miss. 289, 24 So. 388;
U. S. v. *Gillis,* 95 U. S. 407, 24 L. Ed. 503.

III.

As the contract of April, 1933, was in violation of Section 203, Title 31, U. S. C. A., prohibiting transfers and assignments of claims upon the United States, the opinion and decision of the Circuit Court of Appeals for the Eighth Circuit is in conflict with the following opinions and decisions of the Circuit Courts of Appeal for other circuits and of many state courts in the following cases:

In re Hudford Co. of N. Y., 257 Fed. 722;
Levison v. *Ill. Surety Co.,* 222 N. Y. 280, 118 N. E. 641;
Weyerhaeuser Timber Co v. *First National Bank of Portland,* 43 Pac. (2d) 1078;
Packard Motor Car Co. v. *U. S.,* 59 Court Claims 354;
In re Cargo of Intoxicating Liquors, 40 Fed (2d) 72;
H. M. O. Lumber Co. v. *U. S.,* 40 Fed. (2d) 544;
Dalton Foundries, Inc., v. *U. S.,* 56 Fed. (2d) 483.

IV.

The decision of the trial court was against Maryland Casualty Company on the issue of specific performance. Maryland Casualty Company did not appeal from said decision, nor assign cross-errors and hence the Court of Appeals was without jurisdiction to reverse the decree

of the trial court denying specific performance and to modify same by directing that the relief of specific performance be granted and the decision of the Circuit Court of Appeals is in conflict with the following opinions of this court and the general law on that question:

The Maria Martin, 12 Wall. 37;
Peoria & P. N. R. Co. v. *U. S.,* 263 U. S. 528;
Bolles v. *Outing Co.,* 175 U. S. 562;
2 Rul. Cas. L. 156;
U. S. v. *Am. Exp. Co.,* 265 U. S. 125;
Cherokee Nation v. *Black Feather,* 155 U. S. 528;
Bothewell v. *U. S.,* 254 U. S. 231;
Terminal R. Asso. v. *U. S.,* 266 U. S. 17;
Clory v. *Foundry Co.,* 132 U. S. 612.

IV.

The jurisdiction of the Circuit Court of Appeals is exclusively appellate. It had, therefore, no jurisdiction to reverse the action of the trial court in denying the relief of specific performance to the appellee since the appellee had not appealed and its decision and opinion on that point is in conflict with the following decisions of said and other Circuit Court of Appeals on the same question:

O'Neil v. *Mining Co.,* 174 Fed. 527, l. c. 535 (C. C. A. 8);
Rogers v. *Mining Co.,* (C. C. A. 8) 154 Fed. 606;
Morrison v. *Burnette,* (C. C. A. 8) 154 Fed. 617;
Midland Valley Ry. Co. v. *Fulgham,* (C. C. A. 8) 181 F. 91;
National Fire Ins. Co. v. *Elliott,* (C. C. A. 8) 7 F. (2d) 522;
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Swger v. *Smith,* (C. C. A. 4) 194 Fed. 762, l. c. 765;
Backhurst v. *Johnson,* (C. C. A. 8) 72 F. (2d) 644;
Merchant's S. Co. v. *Johnson,* 69 F. (2d) 940;
Jones Store Co. v. *Dear,* 56 F. (2d) 996;
Alexander v. *Cosden Co.,* 290 U. S. 484, l. c. 487.

VI.

The facts stated in the opinion of the Court of Appeals alone discloses that Morley Construction Company had repeatedly requested the Maryland Casualty Company to perform its contract to place enough money in the joint account to complete the plastering contract and that Maryland Casualty Company refused so to do and there is nothing in the record, nor in the opinion of the Court of Appeals, that warrants any inference that there was a modification of the contract or any acquiescence in such modification on the part of the Morley Construction Company. The very opinions cited by the Court of Appeals on the question of acquiescence, to-wit,

Becker v. *Becker,* 250 Ill. 117, 95 N. E. 70;
Langley v. *Devlin,* 95 Wash. 171, 163 Pac. 395 (R. 126);

are not opinions which justify its conclusion with reference to acquiescence and its conclusion that the Construction Company acquiesced in a breach or modification of the contract by the Maryland Casualty Company is wholly unjustified and is merely an arbitrary and capricious decision of the Circuit Court of Appeals.

VII.

The opinion of the Court of Appeals holding that the contract could be enforced conflicts with the opinions of this court.

Cathcart v. *Robinson*, 5 Peters 264;
Rutland Marble Co. v. *Ripley*, 10 Wall. 339;
Dorsey v. *Packwood*, 12 How. 126;
Morgan v. *Morgan*, 2 Wheaton 290.

This for the reason that Morley Construction Company could not have any relief in equity against the Maryland Casualty Company at the time said Company filed its bill to compel it to deposit enough to complete the plastering contract. That entire burden was cast upon the Construction Company and the fact that the Casualty Company failed to pay the money was in itself absolute proof of the damage and injury sustained by the Construction Company.

VIII.

The act of the respondent in tying up the proceeds of the voucher was an act in conflict with the duty of Maryland Casualty Company as surety and amounted to a breach of its contract of suretyship and hence it was not entitled to any relief for the reason that its wrongful conduct has compelled a breach of the performance bond (*S. W. Surety & Ins. Co.* v. *Wells*, 217 Fed. 294; *McElroy* v. *Hathaway*, 6 N. W. 876, per Cooley, J.; *American Bonding Company* v. *Logansport & W. Valley Gas Co.*, 95 Fed. 96.)

IX.

The bill of complaint sought the enforcement of the contract in writing marked Exhibit "A" by virtue of which Morley Construction Company was to open an account. According to the tenor of Exhibit "A" the account was to be the account of Morley Construction Company, subject to the joint control of the parties. This is the contract sought to be enforced but Defendant's Exhibit 3, dated April 29, 1933, modified Exhibit "A" by providing that the moneys should be the joint property of Morley Construction Company and Maryland Casualty Company and that the account should be in all respects a joint account. It was stated that this agreement was made on the same day as the other agreement (R. 69). It further appears that there was a further modification of the contract to the effect that on June 21, 1933, to a joint account in the name of H. F. Morley and the Maryland Casualty Company. Exhibit 3 and the modification changing the names of the parties to the account and providing that it should be the joint property of the parties amounted to a modification and change of the contract sought to be enforced and deprived the court of jurisdiction to enforce it. (See R. 94 and Exhibits at R. 97-98.)

X.

Notwithstanding the allegation in the bill of complaint that property within the jurisdiction of the District Court of the United States for the Western District of Missouri was involved, yet the evidence disclosed that the only property involved was the amount of the voucher which the Treasurer of the United States refused to pay and

this fact is conclusively admitted by respondent's reply brief. It, therefore, follows that there was no property within the jurisdiction of the District Court to which the jurisdiction of said court as a court of equity could attach and since some of the acts to be performed with reference to property beyond the jurisdiction of the District Court were acts of the M. & T. Trust Company and its employees who were not parties, the District Court was without jurisdiction to grant the decree of specific performance under the general law well stated in *Alexander* v. *Hamilton,* 287 Fed. 508.

XI.

The pleadings and the evidence disclosed that the M. & T. Trust Company of Buffalo, N. Y., was not a party to the suit in the courts below, nor were the representatives of the respondent, specified in Exhibit "A," and in view of the fact that said M. & T. Trust Company and said Kelly and Schaus must exercise their discretion in the performance of their duties with reference to disbursement of the funds and as the District Court has no jurisdiction to superintend the disbursement of the fund, it follows that it has no jurisdiction to tender a decree impounding the fund and placing it under the control of parties over whom the District Court had no control and that the decision of the District Court undertakes to compel it to do that which it is without jurisdiction to do. *Alexander* v. *Hamilton,* 287 Fed. 508; *Moore* v. *Toplif,* 107 Ill. 241; 58 C. J. 1141; 50 C. J. 245.

XII.

The mere fact that the Maryland Casualty Company was a surety for the Construction Company did not give it any right to interfere with the contractor's right to use the money or checks received by it from the United States in any manner that it saw fit prior to the day on which the liability of the Surety Company attached, or six months after the final settlement. *Kane et al.* v. *First National Bank of El Paso, Texas,* 56 Fed. (2d) 534.

XIII.

Under the construction given to the statute giving this court jurisdiction on certiorari to review decisions of the Circuit Courts of Appeals, as stated by Justice Brewer in *Forsyth* v. *Hammond,* 166 U. S. 506, to-wit:

> "Nine separate appellate tribunals might by their difference of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of Federal decision.

And as stated by Chief Justice Taft in *Magnum* v. *Coty,* 262 U. S. 159, it is said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

And as stated in Rule 38 of this court, this is a case peculiarly calling for the exercise of the discretion vested in this court by the statute to issue the writ prayed for.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the 8th Circuit and of the case numbered and entitled on its docket No. 10477, in equity, *Morley Construction Company, a corporation, and Merchants Bank of Kansas City, Missouri, a corporation, appellants,* v. *Maryland Casualty Company, a corporation, appellee,* to the end that cause may be reviewed and determined by this court as provided for by the statutes of the United States and that the judgment of the United States Circuit Court of Appeals for the 8th Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated August 28, 1936, at Kansas City, Missouri.

Morley Construction Company, a corporation, and Merchants Bank of Kansas City, Missouri, a corporation, Petitioners, by

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals for the 8th Circuit is not yet reported. It is found at pages 122 to 132, inclusive, of the record.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is June 22, 1936. A petition for rehearing was filed in accordance with the rule of said Circuit Court of Appeals and denied on the 20th day of July, 1936.

2. The statutory provision which is believed to sustain the jurisdiction of this court is the following: Sec. 347, 28 U. S. C. A., providing:

> "* * * in any case, civil or criminal, in a Circuit Court of Appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judgment or decree of such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal." (Which said statute in its present form was adopted February 13, 1925, 43 Stat. 938.)

III.

Statement of the Case.

This has already been stated in the preceding petition. Said petition is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the judge of the District Court should have granted the relief of specific performance to appellee and this notwithstanding it appeared that the appellee was satisfied with the decision against it on the issue of specific performance and failed to appeal from the said decision and failed to assign cross-errors.

2. The Circuit Court of Appeals erred in holding that notwithstanding the bill of complaint of appellee failed to allege that it had performed the contract on its part which it sought to have enforced, yet the Circuit Court of Appeals held in its opinion that the trial court had jurisdiction to grant the relief of specific performance notwithstanding the said omission in the petition.

3. The Court of Appeals erred in holding that the trial court properly overruled petitioners' motion to dismiss the bill of complaint.

4. The Court of Appeals erred in holding that notwithstanding the record shows that appellee failed to deposit even one-half of the amount it agreed to deposit in the joint account, yet that by depositing less than one-half of the amount agreed to be deposited the appellee had substantially performed its contract.

5. The Court erred in holding that notwithstanding it found and the record disclosed that petitioner had repeatedly requested the appellee to perform its contract and that it had refused to do so, yet that because petitioner did not again make a request which had been theretofore denied and declined that it had thereby modified or agreed to a modification of the contract on which the bill of complaint was founded.

6. The court erred in that it held contrary to the decisions of this court and contrary to the law governing it that notwithstanding the pleadings and the evidence disclosed that the Maryland Casualty Company had deliberately and intentionally breached its contract and also its surety contract and failed to comply with petitioners' request to perform it that yet respondent was entitled to the relief of specific performance, notwithstanding respondent had waived any right to complain of error in the Court of Appeals by failing to appeal from the decision on the point against it.

7. The Court of Appeals erred in holding that the Maryland Casualty Company and the Morley Construction Company made a contract which would operate to give the Maryland Casualty Company a right to have a legal or equitable interest in a claim of the petitioner against the United States, notwithstanding Section 203, Title 31, U. S. C. A., same being R. S. 3477, prohibited any transfer or assignment of any reason, legal or equitable, in any claim against the Government.

8. The Court of Appeals erred in that notwithstanding it appeared from the pleadings and the evidence and the findings of the court below and the findings of the trial court and also the findings of the Circuit Court of Appeals, that the contract sought to be enforced was a con-

tract which was made by the parties in violation of the express terms of the statute, to-wit: Section 203, Title 31, U. S. C. A., and notwithstanding it appeared that even if Exhibit "A" had been a lawful contract that the appellee had failed to perform the obligations thereof on its part and thus and thereby violated it and forfeited any rights thereunder and notwithstanding respondent Maryland Casualty Company had failed to appeal from the decision on the issue of specific performance against it or on any issue and was satisfied with the decree of the trial court, yet the Circuit Court of Appeals transcended in the extent and character of its decision and judgment the law which was applicable to the case and to the Court of Appeals and to the record before it.

ARGUMENT.

The reasons given in the petition for the writ, together with those set forth in the motion for a rehearing (R. 135-146) so plainly state the position of the petitioner and show petitioner's right to have the writ prayed for issued that petitioner waives argument except as follows:

I.

The act of the court of appeals in reversing the decision of the trial court denying specific performance was an act which it was not authorized to do under the law applicable to the court and to the issues for the reason that respondent was defeated in the trial court by the denial of the prayer for specific performance and as it did not appeal from the decision and decree of the trial court, then the court of appeals had no jurisdiction, right, power or authority to reverse the decree or to modify the decree so as to change it from a denial of specific performance and a direction to the trial court to grant specific performance. In *The Maria Martin* v. *Trans. Co.*, 12 Wall. 37, 20 Law Edition, 251, the court said (leading case on the point):

> "Both parties in a civil action may sue out a writ of error, to a final judgment, but where one party only exercises the right the other cannot assign error in the appellate court; and the same right to remove the cause from the subordinate to the appellate court for re-examination is secured to both parties by the act of Congress allowing appeals, instead of writs of error, *in cases of equity* or of admiralty and maritime *jurisdiction,* or of prize or no prize, as provided in the 2d section of the act allowing such appeals. 1 Stat. at L. 84; 2 Stat. at L. 244. Subject to the same rules and

regulations as in case of writs of error, both parties may appeal, *in an equity,* admiralty or prize suit, from the final decree of the subordinate court, *but the appeal, when entered in the appellate court, is also subject to the same restrictions as are prescribed in case of writs of error.* Where each party appeals, each may assign error; but *where only one party appeals, the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken.*" (Italics ours.)

This Hornbook Rule has never been departed from by this court, nor by any of the other courts of appeal of the other circuits and never was departed from by the Court of Appeals until this case came before it.

In support of this statement, we direct attention to the decision in *Peoria & Pekin U. R. Co.* v. *United States of America et al.,* 263 U. S. 528, 68 Law Edition 427, l. c. 431, where the court said:

"* * * by failure to enter a cross-appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this court only in support of the decree which was rendered. *The Maria Martin* (*Martin* v. *Northern Transp. Co.*), 12 Wall. 31, 40, 20 L. ed. 251, 252; *Bolles* v. *Outing Co.,* 175 U. S. 262, 268, 44 L. ed. 156, 158, 20 Sup. Ct. Rep. 94.)"

In *Bolles* v. *Outing Co.,* 175 U. S. 262, 44 Law Edition 156, the court ruled:

"It is sufficient to say of these that the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below. (Citing *Maria Martin.*)"

In *O'Neil* v. *Mining Co.*, 174 Fed. 527, l. c. 535, the inimitable Judge Walter Sanborn said:

> "* * * as the defendants have taken no appeal they cannot be heard in the court to urge that this court should set aside the judgment in their favor. They can present contentions that will support the decree and those only. An appellee or a defendant in error who takes no appeal or writ of error himself cannot by assigning cross-errors *or by brief or argument* confer jurisdiction on a federal appellate court to consider, review, or decide rulings against him in the court below. Much less can he be heard to challenge rulings that were too favorable to him. Cross-errors are not assignable in the national courts. (Citing acres of cases.)"

2 Ruling Case Law, 156, cites *O'Neil* v. *Wolcott Mining Co., supra,* as the original leading case in support of the following text:

> "* * * a party who has not appealed cannot ask of an appellate court a judgment more favorable to himself than the one he obtained in the court below."

The Court of Appeals in this instance granted respondent a judgment more favorable to it than the one obtained in the court below, thus running counter to the law which created and limited its jurisdiction. The same rule was recognized in *U. S.* v. *American Express Co.*, 265 U. S. 125; *Cherokee Nation* v. *Black Feather,* 155 U. S. 528; *Bothwell* v. *U. S.*, 254 U. S. 231, 39 A. L. R. 56.

The Court of Appeals for the 4th Circuit, in *Swger* v. *Smith,* 194 Fed. 762, l. c. 765, held:

> "The appellees have not taken a cross-appeal. Mere assertion of error in an appellee's brief does not give this court jurisdiction to review alleged error against an appellee."

We respectfully submit that the foregoing is in direct conflict with the decision herein.

In 2 R. C. L., page 182, it is said:

> "* * * the appellee or defendant in error who has not appealed or sued out a writ of error cannot assign error, the right to assign errors being restricted to the appellant or plaintiff in error."

This same rule was curtly stated in *Clory* v. *Foundry Co.*, 132 U. S. 612.

See also the decisions of this court in *Blackhurst* v. *Johnson*, 72 Fed. (2d) 644; *Merchants S. Co.* v. *Johnson*, 69 F. (2d) 940; *Jones Store Co.* v. *Dean*, 56 F. (2d) 996; *O'Neil* v. *Wolcott Mining Co.*, 174 F. 527.

In *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 78 Law Edition 452, Mr. Justice Van Devanter said:

> "The discussion in the briefs make it advisable to point out at the outset that we have no occasion to re-examine the third and fourth claims. In the District Court each of these claims was allowed in part and rejected in part. The defendant alone appealed. In the Court of Appeals the third claim was rejected and the award on the fourth reduced. The defendant alone petitioned for a review here. In this situation the plaintiff is not entitled to be heard in opposition to the parts of the decision of the Court of Appeals which were adverse to it—as were the rejection of the third claim and the reduction of the award on the fourth—but only in support of the parts which were in its favor. As to the former it has acquiesced and become concluded by not seasonably petitioning for a review."

In the margin the leading authorities on the question here involved are cited, all of which demonstrate that the only question before the Court of Appeals for its determination was the ruling of the trial court with reference to the question as to whether or not the respondent was entitled to the relief of exoneration and since the court has properly found that it was not entitled to that relief, then it necessarily follows that the Court of Appeals should have reversed the judgment of the trial court with directions to dismiss the bill of complaint with directions to direct the appellee to dismiss its suit pending in the Supreme Court of the District of Columbia so that the Construction Company could use enough of its funds to recover against the defaulting sub-contractors and their surety companies.

II.

Notwithstanding it appeared from the opinion of the Court of Appeals that Morley Construction Company, through its president, repeatedly demanded that Maryland Casualty Company comply with its contract to deposit in the joint account enough money to complete the plastering contract, and that its representative, in response thereto, said:

> "• • • that the Maryland Casualty Company was not going to put any more money into that account or that job" (R. 125),

thus and thereby refusing to carry out his contract, yet the Court of Appeals held that such conduct on the part of the Construction Company in itself showed acquiescence by the Construction Company in the refusal of its request by Maryland Casualty Company. The Court of

Appeals cites the opinion from *Becker* v. *Becker,* 250 Ill. 117, 95 N. E. 70, as an authority supporting the singular decision of the Court of Appeals, but that case has no application whatsoever and is no authority for the extraordinary and arbitrary ruling on this question by the Circuit Court of Appeals. In that case, the suit was not for specific performance of a contract. On the contrary it was a partition suit by the heirs of a wife who was a party to an antenuptial agreement providing that her husband should keep his life insured for a specific sum in favor of his intended wife and that in case she died before he did that all her separate property should go to him and to his heirs. She died before he did and her heirs brought a partition suit naming the husband as a defendant. It appeared that the husband did not keep his life insured up to the time of his wife's death. The court, however, held that the heirs were estopped to claim that the contract was avoided by this failure on the following statement in the opinion:

> "The evidence in this case is uncontradicted that Mrs. Mishler made repeated declarations that she did not need life insurance; that she had money enough to live on and did not believe in life insurance; that the premiums paid therefor were a waste of money; that, after the insurance company in which her husband had his insurance became insolvent, she protested against his taking out other insurance for her benefit; *and that appellee acting on these repeated statements of his wife, did not take other insurance for her benefit.* * * * the uncontradicted evidence she did so insist and that her wishes in this regard were respected and carried out by the appellee. Her heirs should therefore, in equity, be estopped from taking any advantage of appellee's failure to continue the insurance for his wife's benefit."

That statement of the facts and the equity rule applied in that case demonstrates that the Illinois court recognized that if the wife had demanded repeatedly, as had the president of the Construction Company here, that the husband live up to his contract and procure the necessary insurance, then the heirs would not have been estopped to raise the question and so said decision as applied to the facts stated in the opinion, as well as the facts herein, is in direct conflict with the opinion of the court.

Langle v. *Devlin,* 59 Wash. 171, 163 Pac. 395, is no authority whatsoever for the extraordinary ruling of the Circuit Court of Appeals on this point. On the contrary, said opinion gives full effect to the clean hands doctrine and to the maxim that he who seeks equity must do equity and announces the law as this court announced it in *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240. In fact, the Court of Appeals itself recognized that on the facts stated that is apparent to any person that it was rendering a decision in conflict with the opinion in this court in *Keystone Co.* v. *Excavator Co., supra,* for it put the following paragraph in the opinion:

> "We do not wish it to be thought that we are departing from the well-established rules regarding the granting of the remedy of specific performance. Such is not our intention" (R. 126).

We respectfully submit that it is a legal principle that no person can be heard to say that he did not intend to do that which his acts conclusively show that he did intend and which his acts conclusively show that he intended to do. This principle applies in every field of law

and we respectfully submit that it ought to apply to the Circuit Court of Appeals and it ought not to be heard to say that it did not intend to depart in this case from the well-established rules regarding the remedy of the granting of specific performance. For it is manifest on the facts stated in the opinion and in the record with reference to this matter that the Court of Appeals could not have written and filed the opinion which it did if it did not intend to depart *in this case* from the well-established rules regarding the remedy of specific performance. The opinion states that it was not their intention to do so, but the physical facts show that they were misled or in error as to what their intention was. It is evident that the conception of the Circuit Court of Appeals as to the meaning as to what constitutes acquiescence is contrary to the generally accepted notion on the question. We can readily understand how a strong man requested by a weaker person to do something and refused to do so might think that because the person making the request did not shoot at him that he thereby acquiesced. The Court of Appeals has evidently applied this sort of analogy in determining the question as to whether or not the Construction Company acquiesced in the breach. We respectfully submit that this conclusion ought not to be approved by this court and that to permit this opinion to stand will unsettle rights and unsettle the law on this very important question unless corrected for it is in conflict with all the law on the question and should be corrected.

The opinion of the Court of Appeals is in conflict with the legal principle declared by this court and by other courts of appeal and by the courts generally that a person will be conclusively presumed to have intended the

natural consequences of his act and consequently the Circuit Court of Appeals for the Eighth Circuit has stated facts in the opinion which shows that the president of the Morley Construction Company repeatedly requested the Maryland Casualty Company to comply with its contract to deposit enough in the joint account to complete the plastering contract and that at the last interview the Maryland Casualty Company stated that it was not going to put any more money into that account or into that contract and that these facts made it impossible for the Court of Appeals under the rules with reference to specific performance to hold that the Construction Company had acquiesced in the breach of the contract.

The opinion of the Court of Appeals under the physical facts showing that the Maryland Casualty Company had deliberately refused to perform its contract to deposit enough in the joint account to complete the plastering contract and that it had deposited little more than one-third of the amount agreed by it to be deposited and that it arbitrarily did so after having been requested by the Construction Company so to do was an act which was wrong, both morally and legally, and that said act was in violation of the maxims that he who seeks equity must do equity and he who seeks equity must have clean hands and in conflict with the opinion of this court in *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, and the wealth of authority in 4 A. L. R., l. c. 73.

III.

Respondent having violated the maxim that he who seeks equity must do equity and that he who seeks equity must come with clean hands in that it had, though requested so to do, deliberately and intentionally refused to carry out its contract to deposit enough money in the M. & T. Trust Co. account to complete the plastering contract and the trial court having so found as a fact from the evidence before it and after having seen the witnesses and the parties and their counsel the act of the Court of Appeals in rendering its decree directing the trial court on remand to grant the relief of specific performance declared the law directly contrary to the way in which it has been declared by this and all the other courts.

In *Shubert* v. *Woodward,* 167 Fed. 47, l. c. 57, Judge Sanborn said:

> "It is an indispensable condition of a decree for the specific performance of a contract and of the issue of an injunction against its breach that the moving party has not been guilty of a substantial violation of it himself. *He who seeks equity must come into court with clean hands.*" (Italics ours.)
>
> "Whenever there is anything in a lawsuit which with reference to which the plaintiff is unclean he must be denied relief by a court of conscience and of equity."

In *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240, the court said (l. c. 241):

> "The question presented is whether the Circuit Court of Appeals rightly applied the maxim, He who comes into equity must come with clean hands."
>
> * * * * * * *
>
> "Plaintiff contends that the maxim does not apply unless the wrongful conduct is directly connected

with and material to the matter in litigation and that where more than one clause is joined in a bill and plaintiff is shown to have come with unclean hands in respect of only one of them, the others will not be dismissed.

"Whenever a party who, as *actor,* seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct then the doors of the court will be shut against him *in limine;* the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy." (Italics ours.)

Courts of equity close their doors

"* * * only for such violations of conscience as in some *measure affect the equitable relations between the parties in respect of something brought before the court for adjudication.*" (Italics ours.)

Thereupon the court affirmed the judgment in 62 F. (2d) 48, where it was said:

"Any really unconscientious conduct connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience."

"It is enough * * * that the wrongful conduct was in regard to, and directly connected with, *one of the matters in litigation.*" * * * (Italics ours.)

"Under the above-stated principles we are of the opinion that the plaintiff should have been denied relief in a court of equity."

The petition alleged "by said contract plaintiff * * * agreed to place in said account * * * *sufficient money to*

complete the plastering contract'' (R. 3-4, par. 6). It did not allege performance. The contract, fifth paragraph, provided ''The Maryland Casualty Company further agrees to place on deposit in said account * * * sufficient money to complete the Giamberdino plastering contract'' (R. 10-11). The evidence was that it did not perform (R. 76). The court found in finding of fact 2 that plaintiff agreed to deposit in said account ''a further sufficient sum of money to complete the plastering'' (R. 116). The court found (F. F. 3; R. 117) that plaintiff ''did not deposit in the joint account a sufficient sum of money to complete the plastering contract.'' The court's opinion is, ''Nor, in my view of the case, is the plaintiff entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. *The plaintiff did not itself discharge all of its obligations under that agreement''* (R. 118). ''Conclusion of Law 1, the plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2'' (R. 119). Plaintiff solemnly admitted in its reply ''that the sole purpose of plaintiff's complaint is to require the defendant to deposit said money and to require its disbursement in accordance with said alleged contract.'' Notwithstanding the findings of fact and law the decree was directly in conflict therewith, for it ordered ''that defendant Morley Construction Company shall deposit the proceeds from said United States Treasury Warrant No. 2213155 in some bank and such deposit shall be designated as a special trust fund for the payment of bills for labor and materials used on the United States Veterans Hospital in Batavia, New York'' (R. 36). The relief sought by the bill was with reference to said check or warrant (R. 5-6-7-8).

The plaintiff as "actor" breached its contract. Its conduct was unconscionable (*Shubert* v. *Woodward,* 167 Fed., l. c. 57). That unconscionable conduct affected "the equitable relations between the parties in respect of something brought before the court for adjudication" within the rule stated in 290 U. S. 240. The "something" was the "warrant or check." It was with reference to that "something" that the decree gave specific relief, contrary to the rule. That breach or wrongful conduct made plaintiff's "hands unclean" (167 Fed. 57). It was "wrongful conduct in regard to and directly connected with one of the matters in litigation." In fact, it was the one matter in litigation. That conduct should have repelled plaintiff "from the forum whose very foundation is good conscience" (290 U. S. 240).

IV.

The alleged contract as embodied in Exhibit "A" was the particular instrument which the Maryland Casualty Company sought to have enforced. It omitted to disclose to the trial court in its pleading that said Exhibit "A" was not all of the contract or that if it were then that it was modified by Exhibit 3 (R. 73), dated April 29, 1933, but executed on the same day (R. 69) as Exhibit "A," by virtue of which whatever sum was deposited in said account became the joint property of the Maryland Casualty Company and the Morley Construction Company and respondent further failed to disclose to the court in its petition that the agreement mentioned in both those instruments was modified by the agreement of June 21, 1933, changing or substituting the name of H. F. Morley for that of the Morley Construction Company. The original account was that of the Morley Construction

Company, alone, with counter-signature (R. 84), and this was opened in accordance with the terms of Exhibit "A." This, according to the defendant's banker and witness, was changed on June 21, 1933, to a joint account in the name of H. F. Morley and Maryland Casualty Company. It thus appears that the Maryland Casualty Company was not frank with the chancellor, did not disclose all the facts, and the evidence disclosed that the contract which it sought to have enforced, to-wit: Exhibit "A," dated April 28, 1933, was changed and modified by Exhibit 3 (R. 73); and that it was further modified on June 21st by substituting H. F. Morley for the Morley Construction Company and changing it to a joint account. These facts operate to deprive the trial court and the Circuit Court of Appeals of jurisdiction to enforce the agreement specified in Exhibit "A."

V.

The contract as a whole undertook to assign a joint interest to the Maryland Casualty Company of all claims which the Construction Company might thereafter have against the Government arising out of the Batavia contract and was therefore void under the provisions of Section 203, Title 31, U. S. C. A.

Section 203, *supra,* is the same as Section 3477, R. S. Mo. 1929, which was under judgment in the case of *National Bank of Commerce* v. *Downie,* 218 U. S 345. In that case this court held that where one party loans money to another and makes a contract or takes an assignment seeking to give it some interest in a claim against the Government as security the contract or assignment is void, both at law and in equity.

"Turning to § 3477, we find Congress had in mind not only *all* transfers and assignments of *any* claim on the United States, or part of a claim or *any interest therein,* whether the transfer or assignment be absolute or unconditional, and *whatever was the consideration of the transfer or assignment,* but all powers of attorney, orders, or other authorities for receiving payment of any such claim, or *of any part or share thereof.* All such transfers, assignments, powers of attorney, orders, or authorities are declared to be 'absolutely null and void,' except there be a compliance with the conditions fully set out in the statute. None of those conditions were complied with in these cases.

In *United States* v. *Gillis,* 95 U. S. 407, 24 L. Ed. 503, it appears that suit was brought in the court of claims, by the assignee of an unallowed claim on the United States, and the question arose whether the assignee could maintain a suit in his name for the proceeds of the claim. The court of claims sustained the assignee's right to sue, but this court, upon careful examination of the Act of 1853, re-enacted in § 3477 of the Revised Statutes, reversed the judgment, and directed the petition of the assignee to be dismissed. It was contended in that case that the Act of 1853 had reference only to claims asserted before the Treasury Department. But that view was rejected. After observing that the comprehensive provisions of the statute excluded any exceptions to the rule presented, the court said: 'We think, therefore, the Act of 1853 is of universal application, and covers *all claims* against the United States *in every tribunal in which they may be asserted.* And such, we think, was the understanding of Congress when the Revised Statutes were enacted. In the revision, the Act of 1853 was included and re-enacted.'

Among the earlier cases on the general subject is *Spofford* v. *Kirk,* 97 U. S. 484, 488-490, 24 L. Ed. 1032, 1034, 1035, frequently referred to in later decisions and always followed.

That was a case of a suit by Spofford, in the Supreme Court of this district. He became the holder, by assignment, of certain acceptances which, upon their face, provided for payment to be made out of any moneys received from the United States on the claim of one Kirk *against the Government*. The assignee or holder of the acceptances paid value for them, and acted in entire good faith. The question was whether an assignment of a claim against the United States, made before the claim had been allowed, and before a warrant had been issued for its payment, had *any validity, either in law or in equity*. The court of original jurisdiction dismissed Spofford's bill, and the judgment was affirmed here. Mr. Justice Strong, speaking for this court, referred to § 3477 of the Revised Statutes, and, among other things, said: 'It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and *incapacitates every claimant upon the Government from creating an interest in the claim in any other than himself.*' After referring to the fact that the court had not been called upon to decide in the Gillis Case, whether the assignment there involved was invalid as between the assignor and the assignee, the opinion proceeds: 'But if, after the claim in this case was allowed, and a warrant for its payment was issued in the claimant's name, as it must have been, he had gone to the Treasury for his money, it is clear that *no assignment he might have made, or order he might have given, before the allowance, would have stood in the way of his receiving the whole sum allowed.* The United States must have treated as a nullity any rights to the claim asserted by others. It is hard to see how a transfer of a debt can be of no force as

between the transferee and the debtor, and yet effective as between the creditor and his assignee to transmit an ownership of the debt, or create a lien upon it. Yet if that might be, and we do not propose now to affirm or deny it, the question remains, whether the act of Congress was not intended to render *all* claims against the Government, *inalienable alike in law and in equity, for every purpose, and between all parties.* The intention of Congress must be discovered in the act itself. * * * We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the Government. It follows that, in our opinion, the accepted orders under which the appellant claims gave him no interest in the claim of the drawer against the United States, and no lien upon the fund arising out of the claim. His bill was therefore rightly dismissed.' "

VI.

The opinion of the Court of Appeals, holding that the Maryland Casualty Company was not guilty of a substantial breach of its contract is in direct contrast and conflict with the contract made by the parties themselves, for it was specifically stated therein and admitted in the bill of complaint by the Maryland Casualty Company that it had solemnly agreed to deposit enough money in the account to pay for the completion of the plastering contract (R. 3-4) and the opinion of the Court of Appeals finds that that statement is true, and the opinion of the Court of Appeals finds, as does the opinion

of the District Court, and the facts sustain the conclusion that the Maryland Casualty Company failed to carry out its contract, and hence the Court of Appeals had no jurisdiction to hold that the failure of the Maryland Casualty Company to deposit in the joint account either $7,500.00 or $12,000.00 was not a substantial breach of that contract. The only amount deposited either to pay wages due or toward the completion of the plastering contract was $5,700.00, according to the figure found in the opinion of the Court of Appeals, the amount which it was still obligated to pay was $7,800.00, and according to the figure testified to by Mr. Morley, the president of the Construction Company, and the witness for the Casualty Company, the total amount which the Casualty Co. fell short of paying was $12,000.00 (R. 76), so that the failure of the Maryland Casualty Company to deposit more than half of the amount it agreed to deposit cannot on the physical facts be held to be an unsubstantial failure to perform an unsubstantial part of the contract into which it entered and put in three written instruments. That failure caused the Bank to decline to advance $10,000.00 additional (R. 90.)

VII.

Respondent had no right to have the check or warrant impressed with a trust in its favor or in favor of persons supplying labor and materials since said check or warrant was received in the ordinary course of the contractor's business and constituted part of its resources in executing its contract with the United States. The statute prohibiting the assignment of claims against the Government denies such asserted right to respondent.

The rule stated in Section 203, U. S. C. Title 31, supplemented in *Kane et al.* v. *The First National Bank*

of El Paso, Texas, 56 Fed. (2d) 534, applies here. In that case, the Maryland Casualty Company, the above named plaintiff, intervened after the contractor went into bankruptcy. In that case the contractor deposited with a bank for collection checks received as partial payments on the contract. Before the checks were collected, the contractor advised the bank that it could not continue business and the bank credited the entire balance of the bankrupt's checking account upon notes held by the bank against the bankrupt. The opinion says:

> "Maryland Casualty Company intervened as permitted by Texas practice, and sought a judgment against the bank for the $10,000 arising from the Alpine check."

In discussing the merits of the claim of the Maryland Casualty Company to recover, the court said:

> "We are not advised of any statute which requires that payments duly made to a contractor for public work be handled by him in any special way, or be given any particular application. No such contractual obligation appears in this case. In the absence of statute or stipulation otherwise the general responsibility of the contractor is credited in contracting with him, and his general resources are drawn on by him in executing the contract. Money or checks paid to him as the work progresses are the property of the contractor unincumbered by any trust, just as are payments to others for goods manufactured or services performed. The contractor's banker may receive such checks and is not bound to see to their application, nor to ascertain the state of the contractor's account with each contract; nor, if he knows it, need he govern himself in anywise with references thereto. No wrong is done to the contractor's surety in recognizing the contractor's full

title to such checks by taking them on deposit with all the consequences ordinarily attaching to such deposit. The cases supposed to establish a trust in favor of the surety are based on *Prairie State Nat. Bank* v. *United States,* 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412. That case did not involve a payment made to the contractor, but involved the reserve kept back by the United States to secure final performance of the contract for which the surety on the bond had also bound himself. The surety having had to complete the contract claimed this reserve, which was still in the hands of the United States. The Prairie State Bank had only an invalid assignment of it. It was decided that this reserve was a security stipulated in the contract to be held by the creditor for the performance of the obligation, to which the surety became subrogated on performing the obligation just as he would be subrogated to any other security. The case has no application to money not reserved as a security but paid over to the contractor."

Hence, the Maryland Casualty Company, in the case at bar, was without right against the funds in question and without right to obtain any equitable relief.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that justice be done herein and that the conflicts on the important questions herein involved be corrected, and that to such end a writ of certiorari should be granted and this court should review the decision of the United States Circuit Court of Appeals for the Eighth Judicial Circuit and finally reverse it.

Respectfully submitted,

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 325.

MORLEY CONSTRUCTION COMPANY, A CORPORATION, AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, A CORPORATION, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONERS.

WILLIAM BUCHHOLZ and
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Argument—

I. The basis of the suit was merely a suspicion on the part of the Maryland Casualty Company that Morley Construction Company would use the proceeds of the final voucher for purposes other than the payment for labor and materials, hence the finding of the circuit court of appeals on the issue of specific performance is in conflict with the general rule of law on the proposition that no judgment, decree or conviction can rest upon suspicion..... 25

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 325.

MORLEY CONSTRUCTION COMPANY, A CORPORATION, AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, A CORPORATION, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONERS.

STATEMENT OF THE CASE.

Morley Construction Company, a corporation, entered into a contract with the United States Government to construct a veterans hospital in the vicinity of Batavia, New York for the sum of $540,000.00. The Maryland

Casualty Company, a corporation, and surety company, with the construction company, executed the performance bond (standard form), of $275,000.00 on July 28, 1932.

Morley Construction Company immediately engaged in the performance of the work. Thereafter due to labor troubles and the general banking situation early in 1933 and the failure of subcontractors to perform their contracts and its financial condition the construction company could not proceed with the work. Thereupon and on the 28th day of April, 1933, officials of Morley Construction Company met with the Maryland Casualty Company's officials at Buffalo, New York, and entered into a contract to open a joint account which contract consisted of three documents all executed at the same time (Rec. 75). These documents consist of Exhibits "A" (Rec. 10), "B" (Rec. 12) and Defendant's Exhibit 3 (Rec. 77-78). By the contract as expressed in these documents the surety company and its principal agreed that Morley Construction Company would open an account in a bank known as the M. & T. Trust Company, of Buffalo, New York, each depositing the sum of five thousand ($5,000.00) dollars to open it; that the construction company would deposit thereafter all moneys and estimate checks received from the government because of said work in said joint account and that the Maryland Casualty Company and the construction company would jointly own all sums deposited in said account (Rec. 77-78). It was also agreed that all checks on said joint account drawn by the construction company should be countersigned by the surety company's representatives (Rec. 11). It was also agreed that the surety company should (in addition to the initial

deposit) deposit a sufficient sum of money to pay off all plasterers' claims unpaid and sufficient money to complete the plastering contract (see Bill of Complaint, pp. 3-4).

On June 21, 1933, the parties modified the agreement contained in Exhibits "A" and "B" and Defendant's Exhibit 3. The parties then changed the account to a joint account in the names of H. F. Morley and the Maryland Casualty Company. The original account was that of the Morley Construction Company alone, with a countersignature (Rec. 98, 100-A-100-B).

The Morley Construction Company thereafter proceeded with the work, completed the building, made a final settlement with the government on November 9, 1933 (Rec. 95). The Maryland Casualty Company failed to deposit in the joint account sufficient money to complete the plastering contract as agreed by it (Rec. 80-124). The agreed amount was $17,689.29 (Rec. 116) and the amount deposited for plastering contract purposes was $5,700.00 (Rec. 4).

After the completion of the building Morley Construction Company and its officials left New York state and went to Kansas City, Missouri, their home. The balance found to be due by the final settlement, amounting to $59,780.82 (Rec. 19), a check or voucher for said amount was sent to the construction company by the government and said voucher was given by the president of the construction company to petitioner, Merchants Bank of Kansas City, for the purpose of collection under an understanding that when collected the president (as trustee) should receive a cashier's check for the amount

The voucher was deposited by the Merchants Bank in the Federal Reserve Bank, but before it was paid the casualty company filed a suit in the Supreme Court of the District of Columbia and caused process to be served on the Treasurer of the United States and an order to show cause made by said court on receipt of which the Treasurer refused to pay the amount of the check or voucher. Two days afterwards and on the 27th day of November, 1933, the Maryland Casualty Company filed its bill of complaint in the United States District Court at Kansas City, and later on March 3, 1933, filed an amended bill of complaint in the United States District Court at Kansas City, Missouri (Rec. 1), in which it asked for the relief of specific performance of the contract entered into in April, 1933, between the parties and also subrogation and exoneration as surety.

In the bill of complaint the casualty company claimed that the construction company and its officers intended to use the proceeds of the voucher due from the government for purposes other than paying labor and material claims and that they intended to conceal or fraudulently convey the same (Rec. 8).

Petitioners filed their joint and separate motion to dismiss answer and counterclaim on January 5, 1934, and refiled same on September 27, 1934 (Rec. 14-30). The motion to dismiss was made on the grounds that the complaint in equity failed to state facts sufficient to constitute a cause of action or basis for relief against the defendants, or either of them.

The answer also alleged that Maryland Casualty Company had breached its alleged contract and forfeited

all rights thereunder to have the amount of the voucher thereunder deposited and called attention to the failure of the bill of complaint to allege performance of the contract which the Maryland Casualty Company sought to have enforced and denied that the claim of the construction company for the amount due from the government was or could be impressed with a lien or trust in favor of the Maryland Casualty Company. Also pointed out that the time given by the statute for the performance of the obligations of the contract and bond to pay laborers and materialmen had not expired when the suits were brought by the Maryland Casualty Company and that its acts prevented the construction company from collecting its obligations and paying its debts (Rec. 22-23). The counterclaim prayed that the court direct the casualty company to dismiss its suit in the Supreme Court in the District of Columbia (Rec. 23-24).

The Maryland Casualty Company filed a reply on September 18, 1934 (Rec. 37), and an answer to the counterclaim. In said reply, amongst other things, the Maryland Casualty Company alleged:

> "• • • that the sole purpose of plaintiff's complaint is to require the defendants to deposit said money and to require its disbursement in accordance with said alleged contract" (Rec. 35).

The cause was called for trial on September 27, 1934, by the district court (Rec. 57). At the trial Maryland Casualty Company called the president of defendant construction company to the stand and his testimony established that the total amount of the assets over the

obligations of Morley Construction Company was $23,598.84; that some of the assets consisted of claims against the defaulting bonding companies of subcontractors; that the construction company had two claims against the New Amsterdam Casualty Company, one amounting to $19,919.11 and the other in the amount of $532.83; a claim against the Standard Accident Company in the amount of $521.00 and against the National Surety Company in the amount of $20,689.29 (Rec. 73-74). The total amount of claims to be collected amounted to $42,791.23. The construction company desired to be permitted to collect those claims and to collect the amount due from the government in addition, amounting to $59,780.82.

The evidence disclosed without contradiction that the construction company was endeavoring to complete its contract to pay the laborers and materialmen, as it had completed the contract to the satisfaction of the government with reference to that feature of the contract and that the acts of Maryland Casualty Company in bringing the suits in question had prevented it from collecting its debts and discharging its obligations. After hearing the evidence the trial court filed a memorandum opinion, findings of fact, conclusions of law and indicated decree (Rec. 120-125). The court found that:

> "While it was not the intention of the construction company nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in finding of fact No. 4 for any other purpose than the payment of labor and material claims on the Batavia contract the casualty company had

reason to apprehend that such was their intention" (Rec. 123).

It found also that:

> "The construction company never has received the final payment from the United States of $59,780.82 nor any part of it and cannot receive it until the restraining order issued by the Supreme Court of the District of Columbia is set aside by that court. The casualty company filed its bill in this case after it had filed its bill in the Supreme Court of the District of Columbia" (Rec. 122-123).

The court also found:

> "Pursuant to the agreement all money which the construction company received from the United States under the contract, except the final payment of $59,780.82, were deposited in the joint account" (Rec. 122).

The court further found that it was provided by the written agreement that Maryland Casualty Company would advance to the construction company and deposit in the said joint account a sufficient sum of money to pay off all plasterers' claims unpaid and a further sufficient sum of money to complete the plastering (Rec. 121). The court also found that the time at which suits might be independently filed against Maryland Casualty Company, as surety for the construction company, on account of claims for unpaid labor and material bills

> "* * * had not yet arrived when the bill was filed" (Rec. 123).

The court further found:

> "The casualty company did not itself discharge all of its obligations under that agreement" (Rec. 124).

Thereupon the court adjudged that Maryland Casualty Company was not entitled to a decree of specific performance or to the relief of subrogation (Rec. 124). It filed conclusions of law to this effect (Rec. 125). It found that the construction company was insolvent when the bill of complaint was filed and the contract made but not at the time of trial (Rec. 110; Rec. 123). It, however, found that the Maryland Casualty Company was entitled to the relief of exoneration by defendant construction company. It found that the cross bill should be dismissed (Rec. 125). A decree was thereafter entered of record giving effect to these findings of fact and conclusions of law (Rec. 37-39). This decree required the construction company to deposit the proceeds of the voucher, to-wit: $59,780.82, in some bank and to be designated a special trust fund for the payment of labor and materials on the Batavia contract, and to use:

> "All other assets of defendant, Morley Construction Company, which it now has or may hereafter acquire"

for the payment of the labor and material claims on the Batavia contract. An appeal from the decree was taken to the United States Circuit Court of Appeals for the Eighth Circuit (Rec. 52). The cause was argued on May 6th in that court and on the 22nd of June, 1936, the court filed an opinion (Rec. 126-138), together with its decree (Rec. 138-139), in which it directed that the cause be remanded to the district court with directions for modification of the decree in ac-

cordance with the views expressed in the opinion of the court and as so modified the decree was affirmed.

The opinion of the court discloses that notwithstanding the trial court found against Maryland Casualty Company on the issue with reference to specific performance and that that company had failed to prosecute an appeal or cross appeal from the decision against it and had failed to assign cross errors and that Maryland Casualty Company had breached the contract it sought to have performed, yet the court of appeals held that the district court was in error in denying the relief of specific performance and that it should have granted the relief of specific performance and in the opinion directed that the cause be remanded and the relief of specific performance granted to Maryland Casualty Company by the district court on remand. The court of appeals also found that the trial court erred in granting the relief of exoneration to the surety upon the ground that it was not liable at the time the bill was filed and consequently was not entitled to the relief of exoneration.

Thereafter, and in due time, to-wit: on July 7, 1936, petitioners filed a petition for rehearing (Rec. 139). Thereafter, and on July 20th, said petition for rehearing was denied (Rec. 139). Thereafter, the motion for stay of issuance of mandate was filed (Rec. 139-140) on July 30, 1936, and on August 3, 1936, an order staying the issuance of the mandate was made for thirty days. On October 12, 1936, this court granted certiorari herein and the cause is here pending for

disposition pursuant to order granting same. It appears from a motion just filed herein and a copy of an opinion marked Exhibit "A" thereto attached that an action was brought in the United States Court for the Western District of New York on the performance bond after Maryland Casualty Company had caused the assets of the construction company to be impounded in effect; that Maryland Casualty Company obtained a judgment therein for approximately $66,000.00 against Morley Construction Company on December 14, 1936, that it opposed the motion of the construction company to stay execution thereon pending the disposition of this cause; that said court ordered that if the construction company would deposit with its clerk security in the sum of $112,000.00 execution could be stayed; that the decree (Rec. 37-39) herein prevents the construction company from using any of its resources for said purpose; that unless execution be stayed this court will be deprived of jurisdiction and power to adjudicate the rights of the parties herein and that under Section 377, Title 28, U. S. C., and its inherent power orders staying execution and issuing necessary writs should be granted.

SPECIFICATION OF ERRORS.

1. The circuit court of appeals erred in holding that the judge of the district court should have granted the relief of specific performance to appellee and this notwithstanding it appeared that the appellee was satisfied with the decision against it on the issue of specific performance and failed to appeal from the said decision and failed to assign cross errors.

2. The circuit court of appeals erred in holding that notwithstanding the bill of complaint of appellee failed to allege that it had performed the contract on its part which it sought to have enforced, yet the circuit court of appeals held in its opinion that the trial court had jurisdiction to grant the relief of specific performance notwithstanding the said omission in the petition.

3. The court of appeals erred in holding that the trial court properly overruled petitioners' motion to dismiss the bill of complaint.

4. The court of appeals erred in holding that notwithstanding the record shows that appellee failed to deposit even one-half of the amount it agreed to deposit in the joint account, yet that by depositing less than one-half of the amount agreed to be deposited the appellee had substantially performed its contract.

5. The court erred in holding that notwithstanding it found and the record disclosed that petitioner had repeatedly requested the appellee to perform its contract

and that it had refused to do so, yet that because petitioner did not again make a request which had been theretofore denied and declined that it had thereby modified or agreed to a modification of the contract on which the bill of complaint was founded.

6. The court erred in that it held contrary to the decisions of this court and contrary to the law governing it that notwithstanding the pleadings and the evidence disclosed that the Maryland Casualty Company had deliberately and intentionally breached its contract and also its surety contract and failed to comply with petitioners' request to perform it that yet respondent was entitled to the relief of specific performance, notwithstanding respondent had waived any right to complain of error in the court of appeals by failing to appeal from the decision on the point against it.

7. The court of appeals erred in holding that the Maryland Casualty Company and the Morley Construction Company made a contract which would operate to give the Maryland Casualty Company a right to have a legal or equitable interest in a claim of the petitioner against the United States, notwithstanding Section 203, Title 31, U. S. C. A., same being R. S. 3477, prohibited any transfer or assignment of any reason, legal or equitable, in any claim against the government.

8. The court of appeals erred in that notwithstanding it appeared from the pleadings and the evidence and the findings of the court below and the findings of the trial court and also the findings of the circuit court of

appeals, that the contract sought to be enforced was a contract which was made by the parties in violation of the express terms of the statute, to-wit: Section 203, Title 31, U. S. C. A., and notwithstanding it appeared that even if Exhibit "A" had been a lawful contract that the appellee had failed to perform the obligations thereof on its part and thus and thereby violated it and forfeited any rights thereunder and notwithstanding respondent, Maryland Casualty Company, had failed to appeal from the decision on the issue of specific performance against it or on any issue and was satisfied with the decree of the trial court, yet the circuit court of appeals transcended in the extent and character of its decision and judgment the law which was applicable to the case and to the court of appeals and to the record before it.

SUMMARY OF THE ARGUMENT.

I.

The bill of complaint (Par. 18, Rec. 8) was based upon the theory that the casualty company though it had not performed the contract it sought to have enforced had *good* reason to believe that the construction company intended to make a fraudulent conveyance of the proceeds of the final voucher from the government to defraud creditors (Rec. 8). Finding of Fact 7 by the trial court found that the construction company and its officers did not intend to use said proceeds for any other purpose than the payment of labor and material claims and that the apprehension of the casualty company was not based on a *good* reason but merely upon suspicion. The circuit court of appeals stated that there were facts which led the casualty company to believe the Morley Construction Company did not intend to use the funds coming from the United States Government in the payment for labor and materials used on the construction contract (Rec. 134). In so doing the circuit court of appeals, in undertaking to try the case *de novo* and contrary to the facts in the record and found by the trial court, violated the rule formulated by this court in *Adamson* v. *Gilliland,* 242 U. S. 350, holding that the findings of fact based on oral evidence by the trial judge are unassailable, and therefore the opinion of the court of appeals herein conflicts with said opinion of this court, and with the law as declared by all the other cir-

cuit courts of appeals on the question. See *Fidelity Phenix Fire Ins. Co.* v. *Benedict,* 64 F. 347 (C. C. A. 4).

The Court of Appeals for the Fourth Circuit expressly holds in said case that cases in equity on appeal are not tried *de novo.*

II.

The fact that the construction company's entire assets were tied up by the decrees of the courts below and by the suits in the District of Columbia and Kansas City brought by the Maryland Casualty Company nearly six months before its liability could accrue on the performance bond caused a loss to the Morley Construction Company in excess of forty-two thousand ($42,000.00) dollars by preventing it from realizing on its claims against the bonding companies of subcontractors and others and in effect deprived it of its property contrary to the command of the fifth amendment and it was unjust and inequitable under all the authorities and unless the construction company can get relief in this court it will sustain such a total loss. *Fidelity & Deposit Company* v. *Buckley,* 75 N. H. 506; *Willard* v. *Tayloe,* 8 Wall. 557.

III.

The contract consisting of the three instruments executed on April 28, 1933, Exhibits "A," "B" and Defendant's Exhibit 3 (Rec. 77; 78), was a contract by virtue of which the Maryland Casualty Company sought to acquire by transfer or assignment an interest in a claim against the government in violation of Section 203, Title 31, U. S.

C. A. As the contract was illegal and void it cannot be enforced and the opinion and decision of the court of appeals conflict with the following opinions of this court:

National Bank of Commerce v. *Downie*, 218 U. S. 345, 54 L. Ed. 1065.

Spofford v. *Kirk*, 97 U. S. 484, 24 L. Ed. 1032.

American Surety Co. v. *U. S.*, 76 Miss. 289, 24 So. 388.

U. S. v. *Gillis*, 95 U. S. 407, 24 L. Ed. 503.

IV.

As the contract of April, 1933, was in violation of Section 203, Title 31, U. S. C. A., prohibiting transfers and assignments of claims upon the United States, the opinion and decision of the Circuit Court of Appeals for the Eighth Circuit is in conflict with the following opinions and decisions of the circuit courts of appeal for other circuits and of many state courts in the following cases:

In re Hudford Co. of N. Y., 257 Fed. 722.

Levison v. *Ill. Surety Co.*, 222 N. Y. 280. 118 N. E. 641.

Weyerhaeuser Timber Co. v. *First National Bank of Portland*, 43 Pac. (2d) 1078.

Packard Motor Car Co. v. *U. S.*, 59 Court of Claims 354.

In re Cargo of Intoxicating Liquors, 40 F. (2d) 72.

H. M. O. Lumber Co. v. *U. S.*, 40 F. (2d) 544.

Dalton Foundaries, Inc., v. *U. S.*, 56 F. (2d) 483.

V.

The decision of the trial court based on the evidence of witnesses for both parties was against Maryland

Casualty Company on the issue of specific performance. Maryland Casualty Company did not appeal from said decision, nor assign cross errors and hence the court of appeals was without jurisdiction to reverse the decree of the trial court denying specific performance and to modify same by directing that the relief of specific performance be granted and the decision of the circuit court of appeals is in conflict with the following opinions of this court and the general law on that question:

The Maria Martin, 12 Wall. 37.
Peoria & P. N. R. Co. v. *U. S.,* 263 U. S. 528.
Bolles v. *Outing Co.,* 175 U. S. 562.
2 Rul. Cas. L. 156.
U. S. v. *Am. Exp. Co.,* 265 U. S. 125.
Cherokee Nation v. *Black Feather,* 155 U. S. 528.
Bothewell v. *U. S.,* 254 U. S. 231.
Terminal R. Asso. v. *U. S.,* 266 U. S. 17.
Clory v. *Foundry Co.,* 132 U. S. 612.

VI.

The jurisdiction of the circuit court of appeals is exclusively appellate. It had, therefore, no jurisdiction to reverse the action of the trial court in denying the relief of specific performance to the appellee since the appellee had not appealed and its decision and opinion on that point is in conflict with the following decisions of said and other circuit court of appeals on the same question:

O'Neil v. *Mining Co.,* 174 Fed. 527, l. c. 535 (C. C. A. 8).
Rogers v. *Mining Co.,* (C. C. A. 8) 154 Fed. 606.
Morrison v. *Burnette,* (C. C. A. 8) 154 Fed. 617.

Midland Valley Ry. Co. v. *Fulgham,* (C. C. A. 8) 181 Fed. 91.

National Fire Ins. Co. v. *Elliott,* (C. C. A. 8) 7 F. (2d) 522.

Milward v. *Vulcan Furnace Co.,* (C. C. A. 3) 26 F. (2d) 78.

Swger v. *Smith,* (C. C. A. 4) 194 Fed. 762, l. c. 765.

Backhurst v. *Johnson,* (C. C. A. 8) 72 F. (2d) 644.

Merchant's S. Co. v. *Johnson,* 69 F. (2d) 940.

Jones Store Co. v. *Dear,* 56 F. (2d) 996.

Alexander v. *Cosden Co.,* 290 U. S. 484, l. c. 487.

VII.

The facts stated in the opinion of the court of appeals alone discloses that Morley Construction Company had repeatedly requested the Maryland Casualty Company to perform its contract to place enough money in the joint account to complete the plastering contract and that Maryland Casualty Company refused so to do and there is nothing in the record, nor in the opinion of the court of appeals, that warrants any inference that there was a modification of the contract or any acquiescence in such modification on the part of the Morley Construction Company. The very opinions cited by the court of appeals on the question of acquiescence, to-wit:

Becker v. *Becker,* 250 Ill. 117, 95 N. E. 70;

Langley v. *Devlin,* 95 Wash. 171, 163 Pac. 395 (Rec. 126);

are not opinions which justify its conclusion with reference to acquiescence and its conclusion that the construc-

tion company acquiesced in a breach or modification of the contract by the Maryland Casualty Company is wholly unjustified and is merely an arbitrary and capricious decision of the circuit court of appeals.

VIII.

The opinion of the court of appeals holding that the contract could be enforced conflicts with the opinions of this court.

Cathcart v. *Robinson,* 5 Peters 264.
Rutland Marble Co. v. *Ripley,* 10 Wall. 339.
Dorsey v. *Packwood,* 12 How. 126.
Morgan v. *Morgan,* 2 Wheaton 290.

This for the reason that Morley Construction Company could not have any relief in equity against the Maryland Casualty Company at the time said company filed its bill to compel it to deposit enough to complete the plastering contract. That entire burden was cast upon the construction company and the fact that the casualty company failed to pay the money was in itself absolute proof of the damage and injury sustained by the construction company.

IX.

The act of the respondent in tying up the proceeds of the voucher was an act in conflict with the duty of Maryland Casualty Company as surety and amounted to a breach of its contract of suretyship and hence it was not entitled to any relief for the reason that its wrongful conduct has compelled a breach of the performance bond (*S. W. Surety & Ins. Co.* v. *Wells,* 217 Fed. 294; *McElroy*

v. *Hathaway,* 6 N. W. 876, per Cooley, J.; *American Bonding Company* v. *Logansport & W. Valley Gas Co.,* 95 Fed. 96).

X.

The bill of complaint sought the enforcement of the contract in writing marked Exhibit "A" by virtue of which Morley Construction Company was to open an account. According to the tenor of Exhibit "A" the account was to be the account of Morley Construction Company, subject to the joint control of the parties. This is the contract sought to be enforced but Defendant's Exhibit 3, dated April 29, 1933, modified Exhibit "A" by providing that the moneys should be the joint property of Morley Construction Company and Maryland Casualty Company and that the account should be in all respects a joint account. It was stated that this agreement was made on the same day as the other agreement (Rec. 75). It further appears that there was a further modification of the contract to the effect that on June 21, 1933, to a joint account in the name of H. F. Morley and the Maryland Casualty Company. Exhibit 3 (Rec. 77-78) and the modification changing the names of the parties to the account and providing that it should be the joint property of the parties amounted to a modification and change of the contract sought to be enforced and deprived the court of jurisdiction to enforce it (see Rec. 98 and exhibits at Rec. 100A-100B).

XI.

Notwithstanding the allegation in the bill of complaint that property within the jurisdiction of the Dis-

trict Court of the United States for the Western District of Missouri was involved, yet the evidence disclosed that the only property involved was the amount of the voucher which the Treasurer of the United States refused to pay and this fact is conclusively admitted by respondent's reply brief. It, therefore, follows that there was no property within the jurisdiction of the district court to which the jurisdiction of said court as a court of equity could attach and since some of the acts to be performed with reference to property beyond the jurisdiction of the district court were acts of the M. & T. Trust Company and its employees who were not parties, the district court was without jurisdiction to grant the decree of specific performance under the general law well stated in *Alexander* v. *Hamilton*, 287 Fed. 508.

XII.

The pleadings and the evidence disclosed that the M. & T. Trust Company of Buffalo, New York, was not a party to the suit in the courts below, nor were the representatives of the respondent specified in Exhibit "A," and in view of the fact that said M. & T. Trust Company and said Kelly and Schaus must exercise their discretion in the performance of their duties with reference to disbursement of the funds and as the district court has no jurisdiction to superintend the disbursement of the fund, it follows that it has no jurisdiction to render a decree impounding the fund and placing it under the control of parties over whom the district court had no control and that the decision of the district court undertakes to compel it

to do that which it is without jurisdiction to do. *Alexander* v. *Hamilton,* 287 Fed. 508; *Moore* v. *Toplif,* 107 Ill. 241; 58 C. J. 1141; 50 C. J. 245.

XIII.

The mere fact that the Maryland Casualty Company was a surety for the construction company did not give it any right to interfere with the contractor's right to use the money or checks received by it from the United States in any manner that it saw fit prior to the day on which the liability of the surety company attached, or six months after the final settlement. *Kane et al.* v. *First National Bank of El Paso, Texas,* 56 F. (2d) 534.

XIV.

Under the construction given to the statute giving this court jurisdiction on certiorari to review decisions of the circuit courts of appeals, as stated by Justice Brewer in *Forsyth* v. *Hammond,* 166 U. S. 506, to-wit:

> "Nine separate appellate tribunals might by their difference of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of federal decision."

And, as stated by Chief Justice Taft in *Magnum* v. *Coty,* 262 U. S. 159, it is said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given

for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

And as stated in Rule 38 of this court, this is a case peculiarly calling for the exercise of the discretion vested in this court by the statute to issue the writ prayed for.

XV.

It appears from the opinions reported in *U. S. for Use of Johnson* v. *Morley Construction Co. et al.*, 11 F. Supp. 841; *S. C.*, 12 F. Supp. 1017, that Maryland Casualty Company judicially admitted in the action on the performance bond filed in the District Court for the Western District of New York that the claims of the construction company against the subcontractors or materialmen were valid by itself unsuccessfully seeking to have the claims enforced in that action. Not only that but so firmly did Maryland Casualty Company believe in their validity that while it caused the court of the Western Missouri District on its affidavits and representations made in November, 1933, to find that the construction company was insolvent yet to escape the defense of laches in the New York court it filed affidavits as to insolvency and that the Maryland Casualty Company first learned of the insolvency after this case was tried and in November, 1934.

In seeking to get relief on the ground of insolvency of the construction company in different courts respondent's conduct comes within the rule stated by Judge Faris later of the circuit federal court in writing the opinion in *Ogden* v. *Auer*, 184 S. W. 72, thus:

> "For equity ought not to aid those who urge as grounds for one and the selfsame judgment (of insolvency) positions so glaringly contradictory as to evince from the simple recital of them a lack of candor and clean hands, to say no more."

ARGUMENT.

I.

The basis of the suit was merely a suspicion on the part of the Maryland Casualty Company that Morley Construction Company would use the proceeds of the final voucher for purposes other than the payment for labor and materials, hence the finding of the circuit court of appeals on the issue of specific performance is in conflict with the general rule of law on the proposition that no judgment, decree or conviction can rest upon suspicion.

The basis of the suit in the trial court was the unfounded fear of the Maryland Casualty Company that the construction company was about to convert its own money to its own use for purposes other than to pay its obligations for labor and material on the Batavia contract. This is established by finding of fact No. 7, as follows:

> "While it was not the intention of the construction company nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in finding of fact No. 4 for any other purpose than the payment of labor and material claims on the Batavia contract, the casualty company had reason to apprehend that such was their intention" (Rec. 123).

In other words, Judge Otis, in that accurate use of language for which he is noted, finds that the basis of the suit was unfounded suspicion or baseless and perhaps effeminate fears. The bill of complaint states that plaintiff has *good* reason to believe, etc. (Rec. 8).

It was at least a condition precedent to the finding of a decree for the casualty company on the issue of specific performance, not only that the casualty company had reason to apprehend the alleged intention, but that said reason was founded upon facts and not upon mistake, speculation or suspicion, and so the trial judge omits the use of the adjective "good" in his finding. And the fact that the trial judge finds that it was not the intention of the construction company nor its officers, when the bill was filed, to use the proceeds of the warrant for any other purpose than the payment of labor and material claims on the Batavia contract, in itself, establishes that the Maryland Casualty Company had no *good* reason for their apprehension, and that they were merely afraid without any *good* reason that the construction company intended to misuse their own funds. In 4 C. J., page 1411, the word "apprehensive" is thus defined: "Suspicious or fearful of something," citing *Golding* v. *Waterhouse*, 16 N. B. 313, 319. In 2 C. J. 395, the word "afraid" is thus defined: "Impressed with fear or apprehension; fearful." It was in this sense that Judge Otis used that word "apprehend" in finding of fact No. 7. As so used the word was synonymous with fear or suspicion. In *Knisely* v. *British American Insurance Company*, 32 Ont. 376, it is held that in construing the words, "Is there any incendiary danger threatened or *apprehended?*" "If the applicant at the time of making the application really does *apprehend* danger, the company is entitled to know that it is *apprehended* so that if desired inquiry may be made as to the grounds of apprehension and the obligation to answer truthfully is bind-

ing whether the grounds are reasonable or unreasonable." In *Baker* v. *State,* 49 Ala. 350, a statute was involved which permitted the carrying of weapons where any person has *"good"* reason to apprehend an attack. Held that the court properly refused to charge the jury, that if they believe from the evidence that defendant had reason to apprehend an attack they must acquit him since the statutory phrase is much more restricted in meaning than the words of the refused charge. From the foregoing it appears that courts and legislatures contemplate that the words "reason to apprehend" do not mean a *good* or *valid* reason. They merely denote a fear or suspicion which may or may not be *good.* Since the words in finding of fact No. 7 are "had reason to apprehend that such was their intention," it necessarily follows that if a *"good* reason to apprehend" could have constituted a jurisdictional basis for granting the relief of specific performance, yet the trial court did not make such finding. In the concrete sense, therefore, the finding is simply that this litigation is based upon speculation and suspicion. It is well settled that suspicion can never be the basis of a judgment in an action at law, a decree in a suit in equity, or a conviction in a criminal case. The finding of fact by the trial judge as to the lack of intention on the part of the construction company to make a fraudulent conveyance of its property was based on the uncontradicted evidence in the case. There was nothing in the record to justify a contrary finding by the circuit court of appeals.

In that opinion the circuit court of appeals said:

> "There were facts which led the Casualty Company to believe the Morley Construction Company did not intend to use the funds coming from the United States Government in the payment for labor and materials used on the construction contract" (Rec. 134).

But the opinion does not specify any fact on which the said conclusion is based. Said opinion ignores the finding of fact on this question by the trial judge, which is that:

> "* * * it was not the intention of the Construction Company nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in finding of fact No. 4 for any other purpose than the payment of labor and material claims on the Batavia contract" (Rec. 123).

This finding was based on the evidence of the witnesses for both parties. Herbert Morley, a witness for the casualty company, testified that he intended to use "the proceeds of the check from the United States Government" in the payment of labor and material bills (Rec. 85). There was evidence that at the time of the filing of the bill the Morleys had two other government contracts (Rec. 110), one of which was a Morley Construction Company job at Fort Lyon, Colorado, for $313,000.00 and some odd hundred dollars (Rec. 109, 110), and that they had another at Fort Sill amounting to $215,000.00 or $216,000.00 (Rec. 109). Evidence by Maryland Casualty Company's witness Lebrecht and president of the Merchants Bank was that between the time of trial and the filing of the bill the Morleys had deposited $100,000.00

in the Merchants Bank. The evidence of one of the Morleys, which was brought out by the court, was as follows (Rec. 107, 108):

"The Court: Overruled. What did you have to do with that money, if you received it?

A. Pay the bills on the job. We never had any other intention, but to pay those bills.

A. Your Honor, might I say something at this time to you?

The Court: Yes, sir.

A. I think I can give you my side of the picture or our side of this picture in a very few words. That is, with this $59,000.00, this final payment, and with the money in the joint account in the bank at Buffalo, and with the money that should have been advanced on this plasterers' overage, that is, the Hudson contract and the labor and material to complete that contract, if that money had been advanced, plus the money that we could have made arrangements with the bank to borrow, every bill on that job could have been paid and would have been. But it couldn't be paid if they had the Maryland standing in there supervising everything, and if we made a deal with somebody and say we will pay you this much, we want to be able to get a check and get a release in full from that job."

* * * * * * *

"The witness testified that claims had been settled on the basis of 60¢ cash on the dollar and giving a note for the balance; that the creditors have given them a release on their job and their claim against the bond. The money was paid out of the joint account at Buffalo and the checks made out and sent to Buffalo, and they were countersigned by Mr. Kelly or somebody in the office and the checks were paid. It was our intention in

the event we were able to recover against the defaulting contractors or their sureties, to eventually pay these notes so that the creditors would be paid in full as that is the only way that we can keep on doing business, to pay those bills."

Defendant construction company sought to prove the amount of its resources from other contracts aggregated over one-half million dollars (Rec. 109), but the trial court declined to accept the proof (Rec. 109, 110), the court saying:

> "The Court: It alleges insolvency as of the date of the filing of the bill."

Respondent's counsel urged, as a reason for the exclusion of the testimony:

> "This job is not a Morley Construction Company job. * * *"

In this the counsel was wrong for the witness said:

> "A. The Fort Lyon job is a job of the Morley Construction Company.
>
> Mr. O'Donnell: Mr. Harris went to great pains to prove how insolvent it was now.
>
> The Court: Some of his questions indicated that, but the evidence was restricted to the date of the filing of his bill, and he said in answer to the court's question that his questions were restricted to that date.
>
> Mr. Ellison: I understand there is no question as to its present solvency then?
>
> The Court: I don't understand that there is" (Rec. 110).

The court of appeals substituted for this evidence adduced by the witnesses for both parties and the physical facts and the finding of the trial court the suspicion of the Maryland Casualty Company. In doing so it ran counter to the rule declared in *Adamson* v. *Gilliland,* 242 U. S. 350, 61 L. Ed. 256, l. c. 357, 358, thus:

> "The case is preeminently one for the application of the practical rule that so far as the finding of the * * * judge who saw the witnesses depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding it must be treated as unassailable."

It thus appears that the statement in the opinion of the circuit court of appeals that (Rec. 134):

> "There were facts which led the casualty company to believe the Morley Construction Company did not intend to use the funds coming from the United States Government in the payment for labor and materials used on the construction contract"

is not based on any evidence in the record, and is not based on any findings of fact by the trial judge, but is directly contrary thereto. The finding by the circuit court of appeals that suspicion can constitute the basis of a court decision is in conflict with the law generally. That is to say the circuit court of appeals herein dignified the unfounded suspicions of the casualty company as facts. In a legal sense suspicion is "apprehension of something without proof or slight evidence," *State* v. *Dildine,* Mo. App. 269 S. W. 653, or "imagination of something ill," *United States* v. *Green,* 136 Fed. 618;

Gulf Oil Company v. *Shieder*, 30 S. W. 902, 88 Tex. 152; 28 L. R. A. 538; *McCalla* v. *State*, 66 Ga. 346; or "the imagination of the existence of something without proof or upon very slight evidence or upon no evidence," *United States* v. *Green*, 136 Fed. 618; *Gulf Oil Company* v. *Shieder*, 30 S. W. 902, 88 Tex. 152. The essence of a suspicion is that it is without known facts to support it. *Kinstone Cotton Mills* v. *Kuehne*, 130 N. Y. Supp. 779, 129 App. Div. 250. Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. *Bushardt* v. *United Investment Company*, 130 S. E. 637, 121 S. C. 324; *Stewart* v. *Farmers Bank*, 117 N. W. 820, 137 Wis. 66. Suspicion is weaker than belief. *Giddens* v. *Mirk*, 4 Ga. 364. Suspicion imports a less degree of certainty than belief. *Humes* v. *Faber*, 1 R. I. 464, 470. Since therefore the Maryland Casualty Company had no *good* reason to fear, suspect or suppose that the construction company would use its money improperly, it was not justified in filing its bill of complaint in the United States District Court for the Western District of Missouri; nor was it justified in doing likewise in the Supreme Court of the District of Columbia. By so doing it breached its contract of suretyship and precluded itself from getting relief in any court against its principal. Instead of permitting its principal to utilize its resources during the time between the final settlement and the date when the liability of the surety might accrue nearly six months after the filing of the suit as contemplated by its contract of suretyship and the statute, Section 270, Tit. 40, U. S. C., the casualty company jumped on its principal and bound it in veritable

chains and caused a breach of the performance bond and the resulting action in the New York court.

II.

The circuit court of appeals undertook to try the case de novo and to disregard the findings and decree of the trial court on the issue of specific performance supported as they were by oral evidence, notwithstanding the Maryland Casualty Company had failed to appeal from the decree on that issue and therefore the rulings of the circuit court of appeals as to specific performance are in conflict with the rule generally observed in the federal appellate courts on this question.

The trial court found as a fact that:

> "Nor * * * is the plaintiff entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. The plaintiff did not itself discharge all of its obligations under that agreement. Moreover the defendant never has received the final payment due from the United States and could not now comply with a decree concerning the disposition of that specific fund. Specific performance is impossible" (Rec. 124).

This finding is justified by the failure of the bill to allege performance by plaintiff and by the uncontradicted evidence.

The trial court also found as a conclusion of law, that:

> "Plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2" (Rec. 125).

And the trial court, by its decree, decided the issue with reference to specific performance against appellee as follows:

> "Now on this 22nd day of October, 1934, the court having heretofore fully heard and considered the evidence produced and having fully heard and considered the arguments of counsel, and being fully advised in the premises, finds that the plaintiff is not entitled to a specific performance of the contract under date of April 28, 1933, introduced in evidence" (Rec. 38).

Maryland Casualty Company failed to appeal from said finding and decree. Section 225, U. S. C. A., Title 28, gives the circuit court of appeals appellate jurisdiction only, and since there was no appeal by the Maryland Casualty Company, and no appeal or cross appeal by the Maryland Casualty Company, the circuit court of appeals was without jurisdiction, either original or appellate, to interfere with the finding of the trial court on that issue, and without jurisdiction to grant the relief of specific performance or to direct the trial court so to do. It is elementary that the federal appellate courts do not try equity cases on appeal *de novo* where the findings of fact are based upon conflicting evidence or upon evidence which supports them or tends to support them, or depends upon the credibility of witnesses, or where there is evidence in the record consistent with the finding of the trial judge, for in such cases the finding of the trial judge is unassailable on appeal. *Adamson* v. *Gilliland*, 242 U. S. 350, 61 L. Ed. 356, l. c. 357, 358.

The contention of the Maryland Casualty Company was that Exhibit "A" included not only estimate checks but also included all moneys received by the construction company from the government. The construction company has not yet received the money which would have constituted the proceeds of the final voucher which was not an estimate check. Hence, as the trial court found, specific performance was impossible. The finding was not alone that: "The plaintiff did not itself discharge all of its obligations under that agreement" (Rec. 124), but also, "Moreover the defendant never has received the final payment due it from the United States and could not now comply with a decree concerning the disposition of that specified fund. Specific performance is impossible" (Rec. 124). The decision of the court of appeals herein on the issue of specific performance is in conflict with the rule well stated by the Circuit Court of Appeals for the Fourth Circuit in *Fidelity Phenix Fire Insurance Company* v. *Benedict Coal Corp.*, 64 F. (2d) 347, wherein it is said:

> "This means, however, *not that we will hear it de novo,* as contended by defendants, but that we will hear it as we hear *any other equity appeal* under the rule that the findings of fact of the trial judge who saw and heard the witnesses will be given great weight and will not be disturbed unless clearly wrong."

The opinion of the court of appeals herein formulates a new and erroneous rule on the subject by holding (as admitted by respondent) that said court of appeals had jurisdiction to try the case *de novo.* Hence the departure by the Circuit Court of Appeals for the Eighth

Circuit from the law on the question should be corrected. *Forsyth* v. *Hammond,* 166 U. S. 506, *In re Woods,* 143 U. S. 202. This for the reason that the circuit court of appeals has departed "from the accepted and usual course of judicial proceedings," and hence comes within the character of rulings which are indicated as reasons which will be considered in this proceeding under Rule 38 of this court for reversal. The circuit court of appeals was limited and bound by certain well known rules which it wholly ignored. It transcended in the extent and character of its judgment or decree the law which was applicable to it. *Windsor* v. *McVey,* 93 U. S. 274. It accepted respondent's contention that it could, on appeal, try the case *de novo* following the dictum on that question in *Mound City* v. *Castleman,* 187 Fed. 921, cited in respondent's brief in opposition, but that was a case heard on a bill and answer without a reply, and hence could very well be tried *de novo* because the facts alleged in the answer were admitted. Hence the theory of the court of appeals was in conflict with the general rule. Furthermore, the court of appeals seemed to think that it had an unbridled discretion in an equity case on appeal. It overlooked the consideration that, as stated by this court in *U. S.* v. *Mayer,* 235 U. S. 55, by the chief justice: "—the jurisdiction of the circuit court of appeals is exclusively appellate."

That a case in a federal circuit court of appeals is not tried *de novo* is established by the following authorities declaring the federal rule:

Nash v. *Milford,* 33 App. D. C. 142, 144, 149, in a suit for specific performance, the court said of findings of fact in an equity case:

> "Such findings will not be set aside unless it appears that there has been an error of law or a conclusion of fact unwarranted by the evidence."

To the same effect is *Snow* v. *Snow,* 270 Fed. 364.

In *McLaren* v. *McLaren,* 45 App. D. C. 237, it is said:

> "It (the case) was tried in open court with full opportunity in the trial justice to observe the demeanor of the witnesses and judge of their veracity. In such cases the finding of the trial justice on questions of fact *has much the same sanctity as the verdict of a jury,* and will not be disturbed on appeal unless a mistake of judgment is so apparent as to demand a reversal."

In *Pollock* v. *Jamison,* 70 F. (2d) 759, the court said:

> "* * * the rule is well settled that where the judge has seen and heard the witnesses, his findings will not be disturbed unless it clearly appears that he has misapprehended the evidence or that he has gone against the clear weight of the evidence, or as it is sometimes said unless the evidence certified shows that the findings are clearly wrong" (citing many authorities).

The act of the court of appeals in reversing the decision of the trial court denying specific performance was an act which it was not authorized to do under the law applicable to the court and to the issues for the reason that respondent was defeated in the trial

court by the denial of the prayer for specific performance and as it did not appeal from the decision and decree of the trial court, then the court of appeals had no jurisdiction, right, power or authority to try the case *de novo* reverse the decree or to modify the decree so as to change it from a denial of specific performance and a direction to the trial court to grant specific performance. In *The Maria Martin* v. *Trans. Co.*, 12 Wall. 37, 20 Law Edition 251, the court said (leading case on the point):

> "Both parties in a civil action may sue out a writ of error, to a final judgment, but where one party only exercises the right the other cannot assign error in the appellate court; and the same right to remove the cause from the subordinate to the appellate court for reexamination is secured to both parties by the act of Congress allowing appeals, instead of writs of error, *in cases of equity* or of admiralty and maritime *jurisdiction*, or of prize or no prize, as provided in the 2nd section of the act allowing such appeals. 1 Stat. at L. 84; 2 Stat. at L. 244. Subject to the same rules and regulations as in case of writs of error, both parties may appeal, *in an equity*, admiralty or prize suit, from the final decree of the subordinate court, *but the appeal, when entered in the appellate court, is also subject to the same restrictions as are prescribed in case of writs of error.* Where each party appeals, each may assign error; but *where only one party appeals, the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken*" (italics ours).

This hornbook rule has never been departed from by this court, nor by any of the other courts of appeal of the other circuits and never was departed from by the court of appeals until this case came before it.

In support of this statement, we direct attention to the decision in *Peoria & Pekin U. R. Co.* v. *United States of America et al.*, 263 U. S. 528, 68 Law Edition 427, l. c. 431, where the court said:

> "* * * by failure to enter a cross appeal from the court's action in overruling its objection; the right to insist upon it here was lost. The appellees can be heard before this court only in support of the decree which was rendered. *The Maria Martin* (*Martin* v. *Northern Transp. Co.*), 12 Wall. 31, 40, 20 L. Ed. 251, 252; *Bolles* v. *Outing Co.*, 175 U. S. 262, 268, 44 L. Ed. 156, 158, 20 Sup. Ct. Rep. 94)."

In *Bolles* v. *Outing Co.*, 175 U. S. 262, 44 Law Edition 156, the court ruled:

> "It is sufficient to say of these that the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below (citing *Maria Martin*)."

In *O'Neil* v. *Mining Co.*, 174 Fed. 527, l. c. 535, the inimitable Judge Walter Sanborn said:

> "* * * as the defendants have taken no appeal they cannot be heard in the court to urge that this court should set aside the judgment in their favor. They can present contentions that will support the decree and those only. An appellee or a defendant in error who takes no appeal or writ of error himself cannot by assigning cross errors *or by brief or argument* confer jurisdiction on a federal appellate court to consider, review, or decide rulings against

him in the court below. Much less can he be heard to challenge rulings that were too favorable to him. Cross errors are not assignable in the national courts (citing acres of cases)."

2 Ruling Case Law 156, cites *O'Neil* v. *Wolcott Mining Co., supra*, as the original leading case in support of the following text:

"* * * a party who has not appealed cannot ask of an appellate court a judgment more favorable to himself than the one he obtained in the court below."

The court of appeals in this instance granted respondent a judgment more favorable to it than the one obtained in the court below, thus running counter to the law which created and limited its jurisdiction. The same rule was recognized in *U. S.* v. *American Express Co.*, 265 U. S. 125; *Cherokee Nation* v. *Black Feather*, 155 U. S. 528; *Bothwell* v. *U. S.*, 254 U. S. 231, 39 A. L. R. 56.

The Court of Appeals for the Fourth Circuit, in *Swger* v. *Smith*, 194 Fed. 762, l. c. 765, held:

"The appellees have not taken a cross appeal. Mere assertion of error in an appellee's brief does not give this court jurisdiction to review alleged error against an appellee."

We respectfully submit that the foregoing is in direct conflict with the decision herein.

In 2 R. C. L., page 182, it is said:

"* * * the appellee or defendant in error who has not appealed or sued out a writ of error cannot assign error, the right to assign errors being restricted to the appellant or plaintiff in error."

This same rule was curtly stated in *Clory* v. *Foundry Co.*, 132 U. S. 612.

See also the decisions of this court in *Blackhurst* v. *Johnson*, 72 F. (2d) 644; *Merchants S. Co.* v. *Johnson*, 69 F. (2d) 940; *Jones Store Co.* v. *Dean*, 56 F. (2d) 996; *O'Neil* v. *Wolcott Mining Co.*, 174 Fed. 527.

In *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 78 Law Edition 452, Mr. Justice Van Devanter said:

> "The discussion in the briefs make it advisable to point out at the outset that we have no occasion to reexamine the third and fourth claims. In the district court each of these claims was allowed in part and rejected in part. The defendant alone appealed. In the court of appeals the third claim was rejected and the award on the fourth reduced. The defendant alone petitioned for a review here. In this situation the plaintiff is not entitled to be heard in opposition to the parts of the decision of the court of appeals which were adverse to it—as were the rejection of the third claim and the reduction of the award on the fourth—but only in support of the parts which were in its favor. As to the former, it has acquiesced and become concluded by not seasonably petitioning for a review."

In the margin the leading authorities on the question here involved are cited, all of which demonstrate that the only question before the court of appeals for its determination was the ruling of the trial court with reference to the question as to whether or not the respondent was entitled to the relief of exoneration and since the court has properly found that it was not entitled to that relief, then it necessarily follows that the court of appeals should have reversed the judgment of the trial

court with directions to dismiss the bill of complaint with directions to direct the appellee to dismiss its suit pending in the Supreme Court of the District of Columbia so that the construction company could use enough of its funds to recover against the defaulting subcontractors and their surety companies.

III.

Notwithstanding it appeared from the opinion of the court of appeals that Morley Construction Company, through its president, repeatedly demanded that Maryland Casualty Company comply with its contract to deposit in the joint account enough money to complete the plastering contract, and that its representative, in response thereto, said:

> "* * * that the Maryland Casualty Company was not going to put any more money into that account or that job" (Rec. 125),

thus and thereby refusing to carry out his contract, yet the court of appeals held that such conduct on the part of the construction company in itself showed acquiescence by the construction company in the refusal of its request by Maryland Casualty Company. The court of appeals cites the opinion from *Becker* v. *Becker,* 250 Ill. 117, 95 N. E. 70, as an authority supporting the singular decision of the court of appeals, but that case has no application whatsoever and is no authority for the extraordinary and arbitrary ruling on this question by the circuit court of appeals. In that case, the suit was not for specific performance of a contract. On the contrary

it was a partition suit by the heirs of a wife who was a party to an antenuptial agreement providing that her husband should keep his life insured for a specific sum in favor of his intended wife and that in case she died before he did that all her separate property should go to him and to his heirs. She died before he did and her heirs brought a partition suit naming the husband as a defendant. It appeared that the husband did not keep his life insured up to the time of his wife's death. The court, however, held that the heirs were estopped to claim that the contract was avoided by this failure on the following statement in the opinion:

> "The evidence in this case is uncontradicted that Mrs. Mishler made repeated declarations that she did not need life insurance; that she had money enough to live on and did not believe in life insurance; that the premiums paid therefor were a waste of money; that, after the insurance company in which her husband had his insurance became insolvent, she protested against his taking out other insurance for her benefit; *and that appellee acting on these repeated statements of his wife, did not take other insurance for her benefit.* * * * the uncontradicted evidence she did so insist and that her wishes in this regard were respected and carried out by the appellee. Her heirs should therefore, in equity, be estopped from taking any advantage of appellee's failure to continue the insurance for his wife's benefit."

That statement of the facts and the equity rule applied in that case demonstrates that the Illinois court recognized that if the wife had demanded repeatedly, as had the president of the construction company here, that the husband live up to his contract and procure the neces-

sary insurance, then the heirs would not have been estopped to raise the question and so said decision as applied to the facts stated in the opinion, as well as the facts herein, is in direct conflict with the opinion of the court.

Langley v. *Devlin,* 95 Wash. 171, 163 Pac. 395, is no authority whatsoever for the extraordinary ruling of the circuit court of appeals on this point. On the contrary, said opinion gives full effect to the clean hands doctrine and to the maxim that he who seeks equity must do equity and announces the law as this court announced it in *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240. In fact, the court of appeals itself recognized that on the facts stated that is apparent to any person that it was rendering a *decision in conflict with the opinion* in this court in *Keystone Co.* v. *Excavator Co., supra,* for it put the following paragraph in the opinion:

> "We do not wish it to be thought that we are departing from the well-established rules regarding the granting of the remedy of specific performance. Such is not our intention" (Rec. 126).

We respectfully submit that it is a legal principle that no person can be heard to say that he did not intend to do that which his acts conclusively show that he did intend. This principle applies in every field of law and we respectfully submit that it ought to apply to the circuit court of appeals and it ought not to be heard to say that it did not intend to depart in this case from the well-established rules regarding the remedy of the granting of specific performance. For it is manifest on the

facts stated in the opinion and in the record with reference to this matter that the court of appeals could not have written and filed the opinion which it did if it did not intend to depart *in this case* from the well-established rules regarding the remedy of specific performance. The opinion states that it was not their intention to do so, but the physical facts show that they were misled or in error as to what their intention was. It is evident that the conception of the circuit court of appeals as to the meaning as to what constitutes acquiescence is contrary to the generally accepted notion on the question. We can readily understand how a strong man requested by a weaker person to do something on refusing to do so might think that because the person making the request did not shoot at him that he thereby acquiesced. The court of appeals has evidently applied this sort of analogy in determining the question as to whether or not the construction company acquiesced in the breach. We respectfully submit that this conclusion ought not to be approved by this court and that to permit this opinion to stand will unsettle rights and unsettle the law on this very important question unless corrected for it is in conflict with all the law on the question and should be corrected.

The opinion of the court of appeals is in conflict with the legal principle declared by this court and by other courts of appeal and by the courts generally that a person will be conclusively presumed to have intended

the natural consequences of his act and consequently the Circuit Court of Appeals for the Eighth Circuit has stated facts in the opinion which shows that the president of the Morley Construction Company repeatedly requested the Maryland Casualty Company to comply with its contract to deposit enough in the joint account to complete the plastering contract and that at the last interview the Maryland Casualty Company stated that it was not going to put any more money into that account or into that contract and that these facts made it impossible for the court of appeals under the rules with reference to specific performance to hold that the construction company had acquiesced in the breach of the contract.

The opinion of the court of appeals under the physical facts showing that the Maryland Casualty Company had deliberately refused to perform its contract to deposit enough in the joint account to complete the plastering contract and that it had deposited little more than one-third of the amount agreed by it to be deposited and that it arbitrarily did so after having been requested by the construction company so to do was an act which was wrong, both morally and legally, and that said act was in violation of the maxims that he who seeks equity must do equity and he who seeks equity must have clean hands and in conflict with the opinion of this court in *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, and the wealth of authority in 4 A. L. R. l. c. 73.

IV.

Respondent having violated the maxims that he who seeks equity must do equity and that he who seeks equity must come with clean hands in that it had, though requested so to do, deliberately and intentionally refused to carry out its contract to deposit enough money in the M. & T. Trust Company account to complete the plastering contract and the trial court having so found as a fact from the evidence before it and after having seen the witnesses and the parties and their counsel the act of the court of appeals in rendering its decree directing the trial court on remand to grant the relief of specific performance declared the law directly contrary to the way in which it has been declared by this and all the other courts.

Not only did Maryland Casualty Company fail to deposit $11,989.29 of the $17,689.29 (Rec. 116) which it agreed to deposit but it *wilfully refused so to do* when demand was made that it comply with and perform its contract. Thus Mr. Kelly made the remark that the Maryland Casualty Company was not going to put any more money into that account on that job (Rec. 81).

In *Shubert* v. *Woodward*, 167 Fed. 47, l. c. 57, Judge Sanborn said:

> "It is an indispensable condition of a decree for the specific performance of a contract and of the issue of an injunction against its breach that the moving party has not been guilty of a substantial violation of it himself. *He who seeks equity must come into court with clean hands*" (italics ours).
>
> "Whenever there is anything in a lawsuit which with reference to which the plaintiff is unclean he must be denied relief by a court of conscience and of equity."

In *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, the court said (l. c. 241):

> "The question presented is whether the circuit court of appeals rightly applied the maxim, He who comes into equity must come with clean hands."
>
> * * * * * * *
>
> "Plaintiff contends that the maxim does not apply unless the wrongful conduct is directly connected with and material to the matter in litigation and that where more than one clause is joined in a bill and plaintiff is shown to have come with unclean hands in respect of only one of them, the others will not be dismissed.
>
> "Whenever a party who, as *actor,* seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct then the doors of the court will be shut against him *in limine;* the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy" (italics ours).

Courts of equity close their doors

> "* * * only for such violations of conscience as in some *measure affect the equitable relations between the parties in respect of something brought before the court for adjudication*" (italics ours).

Thereupon the court affirmed the judgment in 62 F. (2d) 48, where it was said:

> "Any really unconscientious conduct connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience."
>
> "It is enough * * * that the wrongful conduct was in regard to, and directly connected with, *one of the matters in litigation.*" * * * (italics ours).

"Under the above-stated principles we are of the opinion that the plaintiff should have been denied relief in a court of equity."

The petition alleged "by said contract plaintiff * * * agreed to place in said account * * * *sufficient money to complete the plastering contract*" (Rec. 4, Par. 6). It did not allege performance. The contract, fifth paragraph, provided "The Maryland Casualty Company further agrees to place on deposit in said account * * * sufficient money to complete the Giamberardino plastering contract" (Rec. 10-11). The evidence was that it did not perform (Rec. 81). The court found in Finding of Fact 2 that plaintiff agreed to deposit in said account "a further sufficient sum of money to complete the plastering" (Rec. 121). The court found (F. F. 3; Rec. 122) that plaintiff "did not deposit in the joint account a sufficient sum of money to complete the plastering contract." The court's opinion is, "Nor, in my view of the case, is the plaintiff entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. *The plaintiff did not itself discharge all of its obligations under that agreement*" (Rec. 124). "Conclusion of Law 1, the plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2" (Rec. 125). Plaintiff solemnly admitted in its reply "that the sole purpose of plaintiff's complaint is to require the defendant to deposit said money and to require its disbursement in accordance with said alleged contract." Notwithstanding the findings of fact and law the decree was directly in conflict therewith, for it ordered

"that defendant, Morley Construction Company, shall deposit the proceeds from said United States Treasury Warrant No. 2213155 in some bank and such deposit shall be designated as a special trust fund for the payment of bills for labor and materials used on the United States Veterans Hospital in Batavia, New York" (Rec. 36). The relief sought by the bill was with reference to said check or warrant (Rec. 5, 6, 7, 8, 9, 10).

The plaintiff as "actor" breached its contract. Its conduct was wilful and unconscionable (*Shubert* v. *Woodward*, 167 Fed. l. c. 57). That unconscionable conduct affected "the equitable relations between the parties in respect of something brought before the court for adjudication" within the rule stated in 290 U. S. 240. The "something" was the "warrant or check." It was with reference to that "something" that the decree gave specific relief, contrary to the rule. That wilful breach or wrongful conduct made plaintiff's "hands unclean" (167 Fed. 57). It was "wrongful conduct in regard to and directly connected with one of the matters in litigation." In fact, it was the one matter in litigation. That conduct should have repelled plaintiff "from the forum whose very foundation is good conscience" (290 U. S. 240).

V.

The alleged contract as embodied in Exhibit "A" was the particular instrument which the Maryland Casualty Company sought to have enforced. It omitted to disclose to the trial court in its pleading that said Exhibit "A" was not all of the contract or that if it were then that it was modified by Exhibit 3 (Rec. 77, 78), dated

April 29, 1933, but executed on the same day (Rec. 75) as Exhibit "A," by virtue of which whatever sum was deposited in said account became the joint property of the Maryland Casualty Company and the Morley Construction Company and respondent further failed to disclose to the court in its petition that the agreement mentioned in both those instruments was modified by the agreement of June 21, 1933, changing or substituting the name of H. F. Morley for that of the Morley Construction Company. The original account was that of the Morley Construction Company, alone, with counter signature (Rec. 98), and this was opened in accordance with the terms of Exhibit "A." This, according to the defendant's banker and witness, was changed on June 21, 1933, to a joint account in the name of H. F. Morley and Maryland Casualty Company. It thus appears that the Maryland Casualty Company was not frank with the chancellor, did not disclose all the facts, and the evidence disclosed that the contract which it sought to have enforced, to-wit: Exhibit "A," dated April 28, 1933, was changed and modified by Exhibit 3 (Rec. 77, 78), and that it was further modified on June 21st by substituting H. F. Morley for the Morley Construction Company and changing it to a joint account. These facts operate to deprive the trial court and the circuit court of appeals of jurisdiction to enforce the agreement specified in Exhibit "A."

VI.

The contract as a whole undertook to assign a joint interest to the Maryland Casualty Company of all claims which the construction company might thereafter have against the government arising out of the Batavia contract and was therefore void under the provisions of Section 203, Title 31, U. S. C. A.

Section 203, *supra*, is the same as Section 3477, R. S. Mo., 1929, which was under judgment in the case of

National Bank of Commerce v. *Downie*, 218 U. S. 345. In that case this court held that where one party loans money to another and makes a contract or takes an assignment seeking to give it some interest in a claim against the government as security the contract or assignment is void, both at law and in equity.

> "Turning to Section 3477, we find Congress had in mind not only *all* transfers and assignments of *any* claim on the United States, or part of a claim or *any interest therein*, whether the transfer or assignment be absolute or unconditional, and *whatever was the consideration of the transfer or assignment*, but all powers of attorney, orders, or other authorities for receiving payment of any such claim, or *of any part or share thereof*. All such transfers, assignments, powers of attorney, orders, or authorities are declared to be 'absolutely null and void,' except there be a compliance with the conditions fully set out in the statute. None of those conditions were complied with in these cases.
>
> In *United States* v. *Gillis*, 95 U. S. 407, 24 L. Ed. 503, it appears that suit was brought in the court of claims, by the assignee of an unallowed claim on the United States, and the question arose whether the assignee could maintain a suit in his name for the proceeds of the claim. The court of claims sustained the assignee's right to sue, but this court, upon careful examination of the Act of 1853, reenacted in Section 3477 of the Revised Statutes, reversed the judgment, and directed the petition of the assignee to be dismissed. It was contended in that case that the Act of 1853 had reference only to claims asserted before the treasury department. But that view was rejected. After observing that the comprehensive provisions of the statute excluded any exceptions to the rule presented, the court said: 'We think, therefore, the Act of 1853 is of universal application, and covers *all claims* against the United States *in every*

tribunal in which they may be asserted. And such, we think, was the understanding of Congress when the Revised Statutes were enacted. In the revision, the Act of 1853 was included and reenacted.'

Among the earlier cases on the general subject is *Spofford* v. *Kirk*, 97 U. S. 484, 488-490, 24 L. Ed. 1032, 1034, 1035, frequently referred to in later decisions and always followed.

That was a case of a suit by Spofford, in the Supreme Court of this district. He became the holder, by assignment, of certain acceptances which, upon their face, provided for payment to be made out of any moneys received from the United States on the claim of one Kirk *against the government.* The assignee or holder of the acceptances paid value for them, and acted in entire good faith. The question was whether an assignment of a claim against the United States, made before the claim had been allowed, and before a warrant had been issued for its payment, had *any validity, either in law or in equity.* The court of original jurisdiction dismissed Spofford's bill, and the judgment was affirmed here. Mr. Justice Strong, speaking for this court, referred to Section 3477 of the Revised Statutes, and, among other things, said: 'It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and *incapacitates every claimant upon the government from creating an interest in the claim in any other than himself.*' After referring to the fact that the court had not been called upon to decide in the Gillis case, whether the assignment there involved was invalid as between the assignor and the assignee, the opinion proceeds: 'But if, after the claim in this case was allowed, and a warrant for its payment was issued in the claimant's name, as it must have been,

he had gone to the treasury for his money, it is clear that *no assignment he might have made, or order he might have given, before the allowance, would have stood in the way of his receiving the whole sum allowed.* The United States must have treated as a nullity any rights to the claim asserted by others. It is hard to see how a transfer of a debt can be of no force as between the transferee and the debtor, and yet effective as between the creditor and his assignee to transmit an ownership of the debt, or create a lien upon it. Yet if that might be, and we do not propose now to affirm or deny it, the question remains, whether the act of Congress was not intended to render *all* claims against the government, *inalienable alike in law and in equity, for every purpose, and between all parties.* The intention of Congress must be discovered in the act itself. * * * We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are not partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the government. It follows that, in our opinion, the accepted orders under which the appellant claims gave him no interest in the claim of the drawer against the United States, and no lien upon the fund arising out of the claim. His bill was therefore rightly dismissed.' "

In *Union Pacific Railway Co.* v. *McAlpine*, 129 U. S. 305, 32 L. Ed. 673, this court held that the remedy of specific performance presupposes the existence of a valid contract between the parties before the remedy can be given effect.

In *St. Louis National Stock Yards Co.* v. *Terry Co.*, 112 Ill. 384, it was said:

> "It were absurd to talk of specific performance of an agreement that has no existence."

Exhibit 3 declares that by virtue of the contract sought to be enforced the moneys due the construction company from the United States were "the property of the above-named parties" (Rec. 78), concerning which Exhibit 3 the record recites:

> "On the same day another agreement was executed on behalf of the Maryland by Kelly and on behalf of the Morley company by H. F. Morley" (Rec. 75).

The document refers to Exhibit "A," which seems to be the basis for Exhibit "3" (Rec. 77-78). It contains the following provision (Rec. 78):

> "Now, in consideration of such payment and mutual deposits and in the further consideration of One ($1.00) Dollar it is mutually agreed as follows:
>
> First. That all moneys deposited or to be deposited in said account shall be the *joint property* of the Morley Construction Company and the Maryland Casualty Company and the account shall be in all respects a joint account."

The second paragraph provided for delivery of the agreement to the bank and provided that it:

> "* * * shall constitute to them a notice of the fact that the aforementioned account is a joint one and *the property of the above-named parties*" (Rec. 78).

Exhibit 3 was, therefore, either a part of the contract, Exhibit "A," or an interpretation thereof by the parties thereto.

Hence the agreement was an illegal agreement in direct violation of the said statement under all the circumstances. This court in *St. Paul & Duluth Ry. Co.* v. *U. S.*, 112 U. S. 735, 28 L. Ed. 861, had to do with the effect of a mortgage sale of a claim for services rendered to the United States and the court said:

> "* * * in our opinion, the present case is not within the principle of these exceptions, but falls within the purview of the prohibition. It is a voluntary transfer, by way of mortgage, for the security of a debt, and finally completed and made absolute by a judicial sale.
>
> If the statute does not apply to such cases, it would be difficult to draw a line of exclusion which leaves any place for the operation of the prohibition.
>
> So, the transfer, by the same proceeding, of the contract itself, so as to entitle the assignee to perform the service and claim the compensation stipulated for, is forbidden by Section 3737, R. S."

The same principle has been declared in *Flint and Pere Marquette Railroad Co.* v. *United States*, 112 U. S. 762, 28 L. Ed. 862, a mortgage was executed by the railroad conveying to the mortgagee all choses in action and all claims and demands whatsoever, including claims against the United States. Said the court:

> "As it has just been decided in the case of the Saint Paul and Duluth Railroad Company that the assignment and transfer of such a claim was rendered void as against the United States by Section 3477, R. S., the appellant had no title to the claim

sued on which it could enforce in the court of claims."

And so it follows that the agreement was equivalent to a voluntary mortgage for the security of a debt, and when such voluntary mortgage is finally completed and made absolute by judicial sale, it comes within the prohibition of the statute.

VII.

The opinion of the court of appeals, holding that the Maryland Casualty Company was not guilty of a substantial breach of its contract, is in direct contrast and conflict with the contract made by the parties themselves, for it was specifically stated therein and admitted in the bill of complaint by the Maryland Casualty Company that it had solemnly agreed to deposit enough money in the account to pay for the completion of the plastering contract (Rec. 3-4) and the opinion of the court of appeals finds that that statement is true, and the opinion of the court of appeals finds, as does the opinion of the district court, and the facts sustain the conclusion that the Maryland Casualty Company failed to carry out its contract, and hence, the court of appeals had no jurisdiction to hold that the failure of the Maryland Casualty Company to deposit in the joint account either $7,500.00 or $12,000.00 was not a substantial breach of that contract. The only amount deposited either to pay wages due or toward the completion of the plastering contract was $5,700.00, according to the figure found in the opinion of the court of appeals, the

amount which it was still obligated to pay was $7,800.00, and according to the figure testified to by Mr. Morley, the president of the construction company, and the witness for the casualty company, the total amount which the casualty company fell short of paying was about $12,000.00 (Rec. 80), so that the failure of the Maryland Casualty Company to deposit more than half of the amount it agreed to deposit cannot on the physical facts be held to be an unsubstantial failure to perform an unsubstantial part of the contract into which it entered and put in three written instruments. That failure caused the bank to decline to advance $10,000.00 additional (Rec. 90).

VIII.

Respondent had no right to have the check or warrant impressed with a trust in its favor or in favor of persons supplying labor and materials since said check or warrant was received in the ordinary course of the contractor's business and constituted part of its resources in executing its contract with the United States. The statute prohibiting the assignment of claims against the government denies such asserted right to respondent.

The rule stated in Section 203, U. S. C., Title 31, supplemented in *Kane et al.* v. *The First National Bank of El Paso, Texas*, 56 F. (2d) 534, applies here. In that case, the Maryland Casualty Company, the above-named plaintiff, intervened after the contractor went into bankruptcy. In that case the contractor deposited with a bank for collection checks received as partial payments on the contract. Before the checks were collected, the contractor advised the bank that it

could not continue business and the bank credited the entire balance of the bankrupt's checking account upon notes held by the bank against the bankrupt. The opinion says:

> "Maryland Casualty Company intervened as permitted by Texas practice, and sought a judgment against the bank for the $10,000.00 arising from the Alpine check."

In discussing the merits of the claim of the Maryland Casualty Company to recover, the court said:

> "We are not advised of any statute which requires that payments duly made to a contractor for public work be handled by him in any special way, or be given any particular application. No such contractual obligation appears in this case. In the absence of statute or stipulation otherwise the general responsibility of the contractor is credited in contracting with him, and his general resources are drawn on by him in executing the contract. Money or checks paid to him as the work progresses are the property of the contractor, unincumbered by any trust, just as are payments to others for goods manufactured or services performed. The contractor's banker may receive such checks and is not bound to see to their application, nor to ascertain the state of the contractor's account with each contract; nor, if he knows it, need he govern himself in anywise with references thereto. No wrong is done to the contractor's surety in recognizing the contractor's full title to such checks by taking them on deposit with all the consequences ordinarily attaching to such deposit. The cases supposed to establish a trust in favor of the surety are based on *Prairie State Nat. Bank* v. *United States*, 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412. That case did not involve a payment made to the contractor, but involved the reserve kept back by the United States

to secure final performance of the contract for which the surety on the bond had also bound himself. The surety having had to complete the contract claimed this reserve, which was still in the hands of the United States. The Prairie State Bank had only an invalid assignment of it. It was decided that this reserve was a security stipulated in the contract to be held by the creditor for the performance of the obligation, to which the surety became subrogated on performing the obligation just as he would be subrogated to any other security. The case has no application to money not reserved as a security but paid over to the contractor."

Hence, the Maryland Casualty Company, in the case at bar, was without right against the funds in question and without right to obtain any equitable relief.

IX.

The Maryland Casualty Company was a compensated surety. It was its duty under the contract to act as surety for the Morley Construction Company and to give the Morley Construction Company an opportunity during the six months provided by Section 270, Title 40, U. S. C., to use the proceeds of the final voucher and its other resources to promptly make payment to laborers and materialmen, and its acts in preventing the construction company from using its money to discharge its obligations under the contract and bond, caused a breach of the performance bond, and consequently the Maryland Casualty Company breached its contract of suretyship and has forfeited all right to relief of any kind or character, either legal or equitable against its principal, the Morley Construction Company.

The plaintiff herein was a surety for hire. It was paid by the construction company to lend its credit to it.

As pointed out in *Rollings* v. *Gunter,* 211 Ala. 671, 101 So. 446:

> "Suretyship is lending credit to aid a principal who has not sufficient credit of his own."

The plaintiff was paid by the construction company to do that which the construction company could not do. Could it have done so, it could have deposited obligations of the United States in lieu of the surety bond. See Title 6, Section 15, U. S. C. A. It was because the construction company did not have the obligations referred to in Section 15 of said Title 6 that it paid the surety company to lend its credit to it, but the surety company sold its credit to the construction company until the construction company had performed the contract with the United States, but it immediately withdrew it as soon as the final settlement was made and prevented the construction company from using its resources to promptly make payments to persons supplying it with labor and materials. In doing so, it breached its contract of suretyship to the great injury of the construction company.

The debt represented by the performance bond had not matured at the time the suit was filed and could not mature until nearly six months thereafter, to-wit, the 9th day of May, 1934. Since this is true, then no cause of action for exoneration had accrued to appellee at the time that it filed the suit in the court below and hence it was prematurely filed. We direct attention to the fact that the earliest judicial recognition of the doctrine of exoneration in favor of a surety against a principal was the case

of *Ranelaugh* v. *Hayes,* 1 Vern. (Eng.) 189, wherein Lord Keeper North, as shown in the official report:

> "* * * compared it (the case under consideration) to the case of a counterbond; where although the surety is not troubled or molested for the debt, yet at any time after the money has become payable *on the original bond,* this court will decree the principal to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him."

We direct the court's attention to the fact that from the report in that case it appears that the principal was engaged in collecting customs and had collected them to the amount of 20,000 pounds and that he was liable to the King for the amount collected before ever there was a breach on the original bond, but the surety who was the Earl of Ranelaugh, having been charged by the King with having breached the original bond and the King having demanded payment from the surety by reason of the breach of the original bond, the surety, though he had made no payment, went into the court of chancery and the result was the declaration by the Lord Keeper above quoted. That is to say, in the original and leading case as to the right of a surety to a decree compelling exoneration it was held that the surety's right did not accrue until the principal *breached the original bond* on which *both* were liable. In all of the cases in which the courts have clearly and accurately laid down the doctrine, they have hewed to the line laid down in *Ranelaugh* v. *Hayes, supra.* The late Judge Sharswood, in *McClurg's Appeal,* 66 Pa. 375, l. c. 381, said:

"* * * as soon as the surety's obligation to pay becomes *absolute* he is entitled in equity to require the principal debtor to exonerate him and he may at once file a bill to compel an exoneration although the creditor has not demanded payment from him."

The statement by Judge Sharswood demonstrates that he contemplated that the *creditor* had the right to demand the payment from the *surety*. Otherwise, why use the foregoing language?

In *Beaver* v. *Beaver*, 23 Pa. 167, it is said:

"The case before us depends upon the equity of a *surety*. As between principal and surety, courts of equity always lend their aid for the protection of the latter. As soon as the surety's obligation has become *absolute*, he is entitled in equity to require the principal debtor to exonerate him, and he may file a bill to compel an exoneration, although the creditor has not demanded payment from him. * * * But the surety would not be entitled to exoneration before the debt became *payable*, because it is implied by the contract."

In *Southwestern Surety Ins. Co.* v. *Wells*, 217 Fed. 294, it is said:

"The doctrine is that *when the obligation* of a *surety* to pay has become *absolute* the principal may be required to pay in relief of the surety. The basis of this is obvious.

If the surety has paid his right legal and equitable, to be reimbursed, is clear. Equity abhors mere formalities and works of supererogation as nature abhors a vacuum. To require the surety to pay, in order that the principal might be required to pay is a circumlocution and superfluous. The direct road to the same objective is to require the

principal to pay. This is common sense, right, and equity.

* * * * * * *

The limitations of the doctrine must not, however, be overlooked. The obligation of the surety to pay must have become absolute. To hold that because a surety may become involved he has an equity to be relieved would be to confer upon him the power to annul his own contract of suretyship'' (italics ours).

In *McElroy* v. *Hathaway,* 6 N. W. 876, Judge Cooley, holding that a surety was not entitled to exoneration before the surety became liable said:

"It is not pretended that this relation is sufficient, in general, to challenge the jurisdiction of equity for the surety's protection. He is supposed deliberately to assume his responsibilities and if the principal fails to meet his obligations with due diligence until the surety deems it necessary to seek a remedy for his protection, *he must first perform the obligation he has entered into for his principal, and then sue for indemnity.* This is what he must do when he is surety on negotiable paper, or on a money bond or any similar undertaking. It will not be claimed that the surety in any such case, *when he becomes alarmed at the failure of his principal to pay or perform promptly, can come into equity and compel the principal to turn over his property to a receiver,* to be applied to the satisfaction of his undertaking."

In *American Bonding & T. Co.* v. *Logansport & W. Valley Gas Co.,* (C. C.) 95 Fed. 49, it was held that a surety could not maintain a bill in equity in the nature of a bill *quia timet* to procure a decree to indemnify him against apprehended danger or loss by reason of an undertaking to procure a restraining order executed as surety for the defendant at the latter's request, where

the suit in connection with which the undertaking was given was still pending, and it was uncertain as to whether any liability would ever accrue. The court said:

> "The bill does not show that the complainant has paid anything on account of its having executed said undertaking as surety, nor that any liability has been finally adjudged by the Supreme Court of the United States against the principal in said undertaking. Whenever a surety signs an obligation with a principal, the law raises an implied agreement to indemnify the surety against all loss and damage by reason of his suretyship. The covenant relied upon in this case, which is 'to indemnify and keep indemnified' the complainant 'from and against any loss,' etc., is no broader in its legal effect than the obligation implied by law in the absence of such special covenant. Nothing is added to the force of the covenant by the words 'and keep indemnified,' because one cannot be 'indemnified' unless he is 'kept indemnified.' As soon as the contract of suretyship was entered into, it is firmly settled that the law raised an implied promise on the part of the principal to indemnify the surety against any loss to which he may be subjected by reason of the contract, and it is equally well settled that the surety cannot recover from the principal until a loss has been actually incurred by the surety. The City of Peru has no present right of action against the principal in the undertaking, and the surety has not been compelled to pay any sum, and, for aught that appears in the complaint, it may never be called upon to pay anything, or be put to any loss whatever, on account of its suretyship. *The complainant has simply incurred, and is still incurring, a risk as surety which it contracted with the defendant to incur, and for which it charged and has received a premium.* A bill in equity certainly cannot be maintained on the covenant set up until the City of Peru has obtained a decree by virtue of which it has a present right to recover of the principal *and surety* the moneys stipulated to be

paid by the terms of the undertaking. When the liability of the principal to make such payment has been finally established by the judgment of the Supreme Court, it will be time enough to pay, or to give indemnity to pay. As was observed by Sir G. M. Giffard, V. C., in *Wooldridge* v. *Norris*, (1868) L. R. 6 Eq. 410: 'Now, as regards the right of a plaintiff to file a bill *quia timet*, the principle is clearly laid down by Lord Redesdale in these terms: "A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has been sometimes called a bill *'quia timet,'* in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus, a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt *when due*, whether the surety has been actually sued for it or not, and, upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances." "At present it is not certain whether any such liability will ever accrue, and certainly the mere apprehension on the part of the surety that it may incur such liability gives it no right to maintain a suit upon a mere covenant to indemnify against loss." ' "

The principal and surety herein occupied that relation by virtue of the execution of a statutory performance bond on which bond neither could be liable to creditors until after May 9, 1934, nearly six months after the filing of the suit (November 27, 1933) and as there was no liability on the bond at the time of the institution of the suit, no cause of action has accrued to plaintiff.

The Act of Congress is incorporated in the performance bond by express reference (Tr. 62). It recites that:

> "If the principal * * * if said contract is for the construction * * * of a public building or a public work within the meaning of the Act of August 13, 1894, as amended by Act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract * * * then, this obligation to be void; otherwise to remain in full force and virtue."

The condition of the bond is:

> "Now, therefore, if the principal * * * *shall promptly* make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract * * * then, this obligation to be void; otherwise to remain in full force and virtue."

It will be noted that the bond does not fix a day certain for payment. The language is "promptly make payment." The question then is, what does the word "promptly" mean under the circumstances herein?

In 50 C. J. 719, the text is:

> "Its meaning, it has been held is relative; it does not have any exact definition with respect to a period of time (*Irvin* v. *Koehler,* 230 Fed. 795), but depends largely on the circumstances of each case (*Irvin* v. *Koehler, supra*)."

In *State* v. *Southern Cotton Oil Co.,* 164 La. 225, it was held that claims made within three years are made "promptly." From the terms of the bond alone, either by the application of the liberal or strict rule of construction, it would be impossible to determine when there was a breach so as to render the surety liable. There could be no breach unless the principal failed to

"promptly make payment." In view of the fact that the meaning of the word "promptly" is "relative" and that it does "not have any exact definition with respect to a period of time," it is necessary to examine the statute embedded in the bond to determine that question. The record discloses that no suit was brought by the government within six months from November 9, 1933. This fact is also established by *U. S. for the Use of Johnson* v. *Morley Construction Company and Maryland Casualty Company,* 11 F. Supp. 841. Nor was there any claim in the plaintiff's petition that the construction company had not carried out its contract with the government in so far as building the building was concerned. On the contrary, it was alleged that the construction company completed the building so that with reference to the instrument in the bond securing performance to the United States, as outlined in *Equitable Surety Company* v. *United States,* 234 U. S. 448, there was no breach. That is, there was no breach with reference to the part of the bond securing performance of the contract to the United States. The question is, was there such breach with reference to the separate provision requiring the construction company to "promptly make payment" to persons supplying labor and materials? The statute itself affirmatively answers the question and points out that there was no breach and could be no breach until six months after the date of the final settlement and nearly six months after the filing of the suit. That is, the breach date could not arrive until May 9, 1934. Says the statute:

"If no suit should be brought by the United States *within six months* from the completion and final settlement of said contract, *then* the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit * * * that labor or materials * * * has been supplied by him or them, and payment *for which has not been made* be furnished with a certified copy of said contract and bond, *upon which he or they shall have a right of action*, and shall be and are hereby, authorized to bring suit in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed * * * and not elsewhere for his or their use and benefit, against said contractor and his sureties, and to prosecute same to final judgment and execution."

The foregoing statutory provisions bind the principal and surety as much as if set out in the bond in terms (*People* v. *Metropolitan Surety Co.*, 211 N. Y. 107, 105 N. E. 99).

The statute establishes that if the principal had paid at any time before May 9, 1934, he would have *promptly* made payments within the meaning of the statute and hence within the meaning of the bond. Until then there was and could be no breach of the bond by either principal or surety. Until then, there was no liability that could be enforced against principal or surety *on the bond*. Of course, the principal had an obligation to make payment for labor and materials supplied "*apart* from any bond, the debtor creditor relation existing *independently*" (*American Surety Co.* v. *Westinghouse E. Mfg. Co.*, 80 L. Ed. 31). "The obligation of the surety, however, *unlike that of the* contractor, was created *solely by the bond*" (*ibid*). Therefore, until the principal failed to

"promptly make payment," that is, until May 9, 1934, the *surety* was not *liable* to any obligee or any creditor. Nor was the principal liable *on the bond* for it was the bond that made his obligation so far as the principal suretyship relationship is concerned "definite and certain" (*ibid*). That is, it fixed the time when the principal's obligation must be performed, thus making it "definite and certain" (*ibid*).

That is, the statute fixed the time when the principal's obligation must be performed, thus making it definite and certain (*ibid*). It follows that as to the principal and suretyship relation, the payment was not a past due payment when the suit was filed. The payment could be made at any time up to May 9, 1934, and could not be *past* due until after that date and it is well settled that a surety cannot have the relief of exoneration or a decree compelling payment by the principal before the surety has made payment unless the debt is *past due*.

In 50 C. J. 270, it is said:

> "In an action to enforce payment by the principal or other exoneration the bill should allege that the debt is *past due* and that the *surety* is liable upon it (citing *Rapp* v. *Relief Co.*, 10 Oh. Cr. N. S. 515, 30 Oh. Cr. Ct. 433)."

It was there held that a petition alleging that a note on which plaintiff was endorser becomes due on the day of filing the petition does not allege *past due indebtedness*, authorizing sureties to enforce payment by the principal, nor state a ground for appointment of receiver.

In *Scales* v. *Cox*, 106 Ind. 261, it is said that:

"The claim against the principal must have matured prior to request."

In *Strong* v. *Fence Co.*, 245 N. Y. 48, Justice Cardozo said:

"Congress has said that contractors shall be liable to materialmen and laborers in an amount to be made determinate by the giving of the bond. The statutory *liability*, which is inseparably linked to the *statutory remedy, assumes* the existence of a bond as an indispensable condition. Till then there is neither federal jurisdiction nor any right of action that can rest upon the statute."

From the foregoing, it appears that the liability and the remedy are inseparable, and hence neither the remedy, nor the liability, nor the right of the creditor against the surety, are existent until the lapse of six months from the date of final settlement. Consequently, there was no liability existing which the plaintiff had any right to enforce when it filed its suit on November 27th, 1933. In Bispham on Equity, we find the following, Section 331, p. 537, 10th Ed.:

"In the ordinary case of principal and surety, as soon as the creditor has acquired the right to *immediate payment from the surety*, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation. (*Wooldridge* v. *Norris*, L. R. 6 Eq. 410; *Nisbet* v. *Smith*, 2 Bro. Ch. 582. See, also, *Pride* v. *Boyce*, Rice's Eq. 276, 287; *Bishop* v. *Day*, 13 Vt. 81, 88; *Hoffman* v. *Johnson*, 1 Bland Ch. 103, 105; *Stevenson* v. *Tarerness*, 9 Gratt. 398; *Rice* v. *Downing*, 12 B. Mon. 44; *Ellis* v. *Southwestern Land*

Co., 108 Wis. 313; note to *Dering* v. *Earl of Winchelsea*, 1 Lead. Cas. Eq. 135 (4th Am. Ed.); *Cotting* v. *Elevator Co.*, 214 Mass. 294; *West Huntsville Co.* v. *Alter*, 164 Ala. 305; *Fidelity Co.* v. *Buckley*, 75 N. H. 506; *Carr* v. *Davis*, 64 W. Va. 528."

In *Cotting* v. *Elevator Co.*, 214 Mass. 294, it is said:

"* * * the *plaintiff* who seeks such relief (that of exoneration) must be under an *existing* and *admitted liability* to the burden or charge from which he seeks to be relieved, or at least the facts must be such as necessarily to *create* such a liability. *Antrobus* v. *Davidson*, 3 Mer. 569, 580; *Hughes-Hallett* v. *Indian Mammoth Gold Mines*, 22 Ch. D. 561; *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*, (1909) 2 Ch. 401, 409."

"In the case at bar plaintiffs do not concede that they are under the liability from which they seek to be exonerated. * * * The bill cannot be maintained on such averments."

* * * * * * *

"The demurrer must be sustained in any event."

In *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561, l. c. 564, it is said:

"* * * this is a simple case of a person who has taken property in his own name on behalf of another, and who is entitled to an indemnity from that other person against liability in respect of that property, suing for an indemnity before the contingency which creates the damage has arisen. It is, in my judgment, a mere action *quia timet*, and it is a very important inquiry whether such action can be maintained. If it can it is obvious that every person who has undertaken a position of responsibility for another which entitles him to any indemnity may sue before the right to indemnity accrues—before the damage has accrued which gives rise to

the right of indemnity. It appears to me that there is no authority for such an action."

In *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*, (1909) 2 Ch. 401, 409, it is said:

"The present action is not like *Dale & Perry* v. *Lolley* (2 Pro. C. C. 582n), where a surety brought an action to compel the debtor to pay a bill not due for twenty months, or *Hughes-Hallett* v. *Indian Mammoth Gold Mines* (22 Ch. D. 861), where he asked for indemnity against future contingent liability."

The Court of Appeals for the Third Circuit in *Stitzer* v. *U. S.*, 182 Fed. 513, held that the liability *on the bond* was not mature in the sense that liability on a promissory note is not mature until the note itself matures, and held that the form of action in that case on the bond was assumpsit and the defense of nonassumpsit permitted the showing that six months had not elapsed from the date of the final settlement. In other words, permitted a showing that there was *no liability.* The Supreme Court in *Texas Pacific Co.* v. *McCord,* 233 U. S. l. c. 163, referred to the *Stitzer* v. *U. S.* case as "a well-considered opinion," and hence we reproduce it.

"The question involved herein is whether a person who has supplied labor and materials to a contractor with the United States has the right to bring an independent action on the bond given under the Act of Congress above referred to, before the expiration of six months from the completion and final settlement of the contract."

* * * * * * *

"To call the statute in question a limitation is not only a misnomer, but an absolute misconception

of the purpose of the act, *which was to give any person or persons supplying* labor and materials to a contractor with the government, *a right of action where before none existed.* The act was not intended to, and does not bar, any cause of action, *but rather creates one.*"

* * * * * * *

"The further claim is made, however, that, by not pleading the statute and by going to trial on the merits, the objection that the suit was prematurely brought was waived. Of course, if the defendants were not required to plead the statute, as we conclude they were not, no waiver would arise out of the fact that it was not pleaded. But, aside from that, we think it was not a case where a waiver could be inferred. The act does not intend that persons may collusively maintain an action thereunder within the six months period exclusively reserved for that purpose to the United States. Such conduct would be in derogation not only of the rights of the United States, but of the act itself. It cannot be that creditors either by collusion or waiver can thwart the purpose of the act. The case might be different if there were no other interested party. Moreover, *it should be borne in mind that during that period the plaintiff had no cause of action,* and there was consequently nothing upon which the defendant's waiver, if any, could act; the defendants could waive a right of their own, but could not, contrary to the express terms of the statute, by waiver *confer a right of action on plaintiff.*"

* * * * * * *

"*No party* prior to the expiration of six months from the completion and final settlement of a contract, *except the United States,* was thereby authorized to sue upon the bond. * * * during that period, *and all of it,* the *only right of action on a bond* given under that statute *is vested exclusively in the United States.*"

* * * * * * *

"The form of action below was assumpsit, and among the pleas pleaded thereto was that of non-assumpsit, and the case was tried upon that plea only. Under such a plea an objection to the suit if prematurely brought is always available. *If a suit were instituted on a promissory note prior to its maturity,* and the defense of nonassumpsit were interposed, there can be no question that thereunder the *immaturity of the note at the time the suit was instituted could be shown.*"

The court in *Texas Cement Co.* v. *McCord,* 233 U. S. l. c. 162, cites *United States* v. *Boomer,* 183 Fed. 726, in support of its statement that:

"The statute thus creates a new liability and gives a special remedy for it and on well-settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

The Boomer case was from the Eighth Circuit, Judges Vandeventer, Hook and Carland sitting. Said the court:

"The statute created a *new legal liability* * * * The time within which the suit must be brought operates as a *limitation of the liability itself* * * * It is a condition attached to the right to sue at all. Time has been made of the essence of the right and *the right is lost if the time is disregarded.* The *liability and the remedy are created by the same statute,* and the *limitation of the remedy* is, therefore, to be treated as *a limitation of the right.*"

In other words, the liability *on the bond* is non-existent *before* and after the six months' period. There is no cause of action *after* the six months' period.

If a cause of action did not exist May 9, 1934, how could plaintiff base its alleged right to exoneration on a liability which was unborn when the bill was filed?

In *Bell* v. *Ry.*, 58 F. (2d) 569 (C. C. A. 8), the court, citing the Boomer case in passing on a federal statute creating a right and fixing the time for its enforcement, said:

> "Under such a statute the lapse of time not only bars the remedy, *but destroys the liability.*"

By the same token the "lapse of time for six months after the final settlement not only brought the remedy into existence but *created* the liability."

The trial court made the mistake of holding as a matter of law that the *liability on the bond* under the Heard Law existed as soon as the materials were furnished or the labor given to the principal. The authorities are the other way. The Supreme Court in *U. S. ex rel. Tex. P. Cement Co.* v. *McCord,* 233 U. S. 163, discussing Section 270, Title 40, said:

> "By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before, and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a

new liability and gives a special remedy for it, and upon well-settled principles *the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself.*"

In that case an action was brought before the lapse of six months and the court held that the liability did not begin until the six months elapsed, saying:

"We think, therefore, that the action was prematurely brought, in view of the facts stated in the certificate. This view of the statute was also taken in a well-considered opinion in the Circuit Court of Appeals for the Third Circuit. *Stitzer* v. *United States,* 105 C. C. A. 51, 182 Fed. 513."

X.

The decree of the court declining to direct the plaintiff to dismiss its cross bill and release the money due from the United States to the construction company and by its decree directing that all of said money be paid to laborers and materialmen rendered a decree in favor of the surety and prejudicial to the creditors and hence was erroneous.

The total assets of the construction company with reference to the Batavia contract amounted to $106,369.84 (Tr. 68-70). However, the item of $41,661.23 consisted of claims against the New Amsterdam Casualty Company and the National Surety Company or National Surety Corporation, which said surety companies declined to pay and hence it was necessary for the construction company to compel payment. There was also a claim against the Standard Accident Company for $521.00. Because of

the action of the plaintiff and of the decree of the court, the construction company was prevented from using its assets to collect the obligations due it and to pay these bills. The court found, Finding of Fact 7, that it was the intention of the officers of the construction company to use the proceeds of the warrant to pay the bills of the construction company.

As Mr. Bernard D. Morley testified:

> "It was our intention in the event we were able to recover against the defaulting contractors or their sureties, to eventually pay these notes so that the creditors would be paid in full as that is the only way that we can keep on doing business, to pay those bills" (Tr. 105).

The court found that this testimony was true. Furthermore, it appears that the Morleys were engaged at the time of the trial, or at least at the time the bill was filed, in other construction enterprises. The court's decree, therefore, operated to the prejudice of the creditors, not alone in that it left the amount specified in the warrant tied up, but it also prevented the construction company from realizing against the defaulting subcontractors and the sureties. The law on this question has been well stated in *Greiberg* v. *Leff*, 146 Atl. 196-197, 104 N. J. Eq. 502; thus:

> "When protection can be afforded a surety without substantial injury to the creditor a court of equity may award that relief without the debt being first paid by the surety."

* * * * * * *

"* * * relief of this nature should only be awarded with due regard to the interests of the creditor, the creditor should not be subjected to the danger of loss, or even unreasonable delay in collecting his debt; indemnity against loss may be required; the special circumstances of the case may control the relief."

Not only is the surety's claim for subrogation subordinate to the rights of laborers and materialmen under this law, but necessarily its equitable claim for exoneration is also subordinate.

This principle has been well put by the circuit court of appeals in *American Surety Co.* v. *Westinghouse Mfg. Co.*, 75 F. (2d) 377 (the court said as to the rights of creditors):

"* * * the appellants' (sureties) claim is subordinate to those of the appellees for the additional reason that the surety is not prior to the creditors being fully paid and satisfied, subrogated to rights and remedies which would operate to the prejudice or injury of creditors."

In *American Surety Co.* v. *Westinghouse Mfg. Co.*, 80 L. Ed. 31, the court said:

"Acquittance under the bond did not leave the surety at liberty to prove against the assets of the insolvent principal on equal terms with the materialmen, still less to go ahead of them. The settled principles of the law of suretyship forbid that competition." * * * A surety who has undertaken to pay the creditors of the principal, though not beyond a stated limit, may not share in the assets of the

principal by reason of such payment until the debts thus partially protected have been satisfied in full. This is the rule where the right to a dividend has its basis in the principle of equitable subrogation."

* * * * * * *

"Slight differences in the facts may cause the equities to vary, and thus vary the result. What concerns us here is the remedy available where the bond has been given under the mandate of a statute. Equity then forbids that the statutory security be whittled down indirectly by any promise of indemnity, general or specific. Debtor and surety may not effectually agree that materialmen and laborers shall have less of the general assets as the price of their right to recover on the bond. Through the bond and the statute a new relation has been established with a new set of equities, not subject to destruction at the pleasure of the principal. The integrity of that relation is in the keeping of the law."

The equities of the creditors with reference to the equitable relief of subrogation has been decided to be superior to that of the surety under this peculiar law and by the same token when the equitable relief is exoneration which is merely a variety of anticipatory subrogation, then the same equitable principles which favor the creditor when the claim is based upon a right to be subrogated to the assets of the principal must necessarily apply. Especially must this be so when the surety seeks exoneration *prematurely* from the assets of the principal to the detriment not alone of the principal, *but of the creditors*.

XI.

The right to exoneration is merely the right which the surety always had to bring a suit against the principal AND THE CREDITOR to compel the creditor to enforce payment against the principal and as the right of creditors to enforce the liability on the bond against the principal and surety had not accrued at the time the bill was filed, there could be no exoneration as all the necessary parties were not in court.

In *King* v. *Baldwin & Tawler*, 2 Johns., Ch., 554, Chancellor Kent pointed out that the right to exoneration was a rule which authorized the surety not merely to *notify the creditor* to sue to the principal debtor nor was it a right to sue the debtor and get a blanket decree to make him pay all his debts as here, but it was a rule which authorized the surety to sue the *creditor* and the principal debtor and *compel* the creditor to compel payment or let the surety be discharged. Thus, l. c. 561 (2 Johns., Chan.):

> "The surety has a right on the day the debt is due to come in chancery and insist on its being put in suit * * *"

l. c. 563:

> "When the surety has ample and well-settled means of relief, through the medium of a court of equity, which will at once *compel* the creditor to do his duty, it is not necessary, and, as I humbly apprehend, not expedient, to introduce a new principle of action between creditor and surety."

l. c. 560:

> "The surety is entitled to pay the debt when it becomes due, *or he may call upon the creditor by the*

aid of this court, to enforce his demand against the principal debtor."

In *Warner* v. *Beardsley*, 8 Wend. 195, Ch. Walworth said:

"If the time of payment is past and the *creditor neglects to proceed*, the surety himself may institute a suit in equity against the principal debtor *and the creditor;* but such suit is not for the purpose of delaying the latter; it is to compel the former to pay the debt, and thus relieve the surety from his responsibility."

In *Gibbs* v. *Mennard*, 6 Paige 258, Chancellor Walworth said, l. c. 260:

"In an ordinary case of suretyship for the payment of a debt, the surety, *after the debt has become due*, may institute a suit in equity against the principal debtor *and the creditor*, for the purpose of compelling the former to pay the debt *and the latter to receive it*, and thus relieve the surety from further responsibility (*Warner* v. *Beardsley*, 8 Wend. Rep. 199; *King* v. *Baldwin*, 2 Johns., Ch. R., 561; 17 John. Rep. 384, *S. C.*)."

In *Alexander* v. *Hamilton*, 287 Fed. 508, this court said:

"The plaintiff urges that he has a right to maintain this action to specifically compel the payments of the notes and mortgages, *because he occupies the position of a surety.* * * * even if this could be held to be such an action, the relief prayed *could not be granted without making the creditor, to whom the money is admittedly owing, a party, so that the exact amount could be determined.* In the foreclosure suit in Montana, to foreclose the mortgage the amount due thereunder can be properly determined."

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject matter of a suit are to be made parties,

and when it appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, it would be useless for the court to grant leave to amend."

• • • • • • •

"Further, the complaint itself specifically alleges that the notes and mortgages are in the hands of parties outside the jurisdiction of the lower court, and there is no allegation of payment or damages actually suffered by the plaintiff, or any claim of title or interest in the land in question" (italics ours).

In 21 R. C. L. 1110, Sec. 146, it is said that a bill of this nature may be filed

"provided no rights of the creditor are prejudiced thereby."

• • • • • • •

l. c. 1111:

"Where a surety comes into a court of equity to compel the principal to pay the debt he stands in the position of an equitable assignee, *and may use the remedies of the creditor at his own risk and costs*" (italics ours).

But the creditors had no remedy against the surety when it filed its bill.

In *Moore* v. *Topliff*, 107 Ill. 241, it is said:

"A surety, after the debt has become due, may, without making payment himself, come into a court of equity and compel the principal to pay the debt (*Hale* v. *Wetmore*, 4 Ohio St. 600; *Tankersley* v. *Anderson*, 4 Dessan Eq. 44; *City of Keokuk* v. *Love*, 31 Ia. 199). In 2 American Leading Cases, the rule is stated thus:

" 'The surety stands in the position of an equitable assignee and may use the remedies of the creditor at

his own risk and cost. He may accordingly file a bill against the principal to compel him to pay the debt at maturity, and *make the creditor a party,* because his interests are at stake, and in order that he may be at hand to receive the money.' ''

In *Neal et al.* v. *Buffington,* 42 W. Va. 327, 26 S. C. 172, l. c. 173, it is said:

''* * * when this suit was brought, the appellant has not paid the debt, and probably has not paid it yet. But he is entitled, nevertheless, the debt being due, to come into equity by bill *quia timet against the creditor* and *debtor,* and compel the latter to make payment, so as to exonerate himself from responsibility. Story, Eq. Jur., 327, 639, 849. He may enforce, for his exoneration, any liens of the creditor on the estate of the principal. He *could not sue the debtor alone,* claiming the right of payment in order that he might discharge the debt; but where is the reason, when he has paid part, against his *bringing the creditor* and principal debtor in, and enforcing the lien for the *payment of the balance to the creditor first.*''

In *Paravine & Wzye* v. *Title Guaranty & Surety Co.,* 36 App. Cas. (D. C.) 348, was a case in which the *creditor* was made a party.

In note to Section 1417, Pomeroy's Equity Jurisprudence, 4th Edition, it said:

''After the obligation becomes payable, the surety, before he has paid it, and whether he has been sued by the creditor or not, may maintain a suit in equity against the debtor—in the nature of a bill *quia timet*—to compel *him* to pay the debt or perform the obligation; provided the creditor can himself enforce payment or performance, and neglects or refuses to do so. The creditor is, of

course, made a codefendant (citing a great number of cases, among others, *Dering* v. *Earl of Winchelsea,* 1 Cox 318, 1 Lead. Cas. Eq., 4th Am. Ed., 120. Also notes in 2 Lead. Cas. Eq., 4th Ann. Ed., 278, 280, 283, 306, 1896, and a great number of other cases)."

In 57 C. J. 1141, it is said:

"Creditors to whom claims are payable, under a contract of indemnity, are not only proper, but *necessary,* parties to a suit for specific performance of such contract."

In 50 C. J. 245, it is said:

"The creditor entitled to the debt for which the surety is liable should be made a party in order to receive payment from the principal."

The foregoing rule is recognized in *Alexander* v. *Hamilton,* 287 Fed. 508.

In *Coleman* v. *Taggart,* 4 Pet. 190, 7 L. Ed. 828, it is said:

"* * * however numerous the persons interested in the subject of a suit they must all be made parties, plaintiffs or defendants in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit; to make the performance of the order perfectly safe to those who have to obey it and to prevent future litigation."

In 50 C. J. 269, it is said:

"In accordance with the well-recognized general rule when the surety proceeds in equity all interested parties who are not complainants should be made

defendants and where the debt is unpaid and the surety seeks exoneration or indemnity by such suit the *creditor must be a party*, for the ultimate relief is not to have the amount paid to the surety, but to the creditor."

Hurm v. *Collignon*, 202 Ky. 807, 261 S. W. 602.
Murphy v. *Jackson*, 58 N. C. 11.
Still v. *Holland*, 1 Oh. Dec. (Reprint) 584.
O'Neal v. *Smith*, 10 Lea. 340.
Gilliam v. *Esselman*, 5 Sneed 86.
Stephenson v. *Taverners*, 9 Gratt. (50 Va.) 398.
Call v. *Scott*, 4 Call (8 Va.) 402.

XII.

As there was no liability on the bond which could be enforced in any court but that of the Western District of New York, then there was no liability on the part of the surety from which the court could grant the equitable relief of exoneration.

In the light of the fact that under the rule limiting the right to exoneration and particularly under the following statement in *Southwestern Surety Ins. Co.* v. *Wells*, 217 Fed. 294, to-wit:

> *"The limitations of the doctrine must not, however, be overlooked. The obligation of the surety to pay must have become absolute. To hold that because a surety may become involved he has an equity to be relieved would be to confer upon him the power to annul his own contract or suretyship."*

It follows that the liability of the surety must not only be absolute by virtue of the lapse of the time that matures the debt for which he is liable, but it must also be absolute and enforceable in the place in which he seeks relief. Otherwise, it is not an *existing* liability.

In other words, the limitation on the right to exoneration as it applies in point of time must necessarily also apply in point of space, or stated differently the liability must have accrued and it must be enforceable where the relief is sought. Hence, time and place must figure in determining whether or not the liability from which a surety seeks relief is a liability which is an existing one in the jurisdiction in which relief is sought.

The liability from which the surety sought relief herein did not exist in any jurisdiction, save and excepting the Western District of New York, by virtue of the provisions of Section 270, Title 40, U. S. C., for said statute conditions the right to enforce the liability by requiring that the suit shall be brought "in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

In other words, the United States consented that suit could be brought in its name for the benefit of persons supplying labor or materials against the surety and against the contractor on the bond only in the Western District of New York and the statute further provides that it shall not be brought elsewhere. Since the United States was a necessary party to this suit in the court below and since it had not consented that it should be sued in this sort of proceeding, it follows that the Congress contemplated that a surety could not be permitted to hamstring its principal by tying up the money which was

due from the government by proceedings such as this in any court, excepting the court wherein the liability of the surety could be enforced.

In 50 C. J. 245, it is said:

> "The form in which that protection may be secured is not material where the right to it exists and can be had without prejudice to the creditor. The creditor entitled to the debt for which the surety is liable should be made a party in order to receive payment from the principal, and the bill should allege that the surety is still liable for the debt."

The United States being a necessary party and it not having given its consent to be sued in the proceeding below demonstrates through the limitations imposed by the Act of Congress, to-wit: Section 270, *supra,* that plaintiff had no right to recover herein and that this action should never have been brought and that it should have been dismissed. Again had the United States been made a party or had the labor and materialmen been made parties they could not have recovered on the bond against the principal or surety thereon in the court below. This for the reason that Section 270, Tit. 40, U. S. C. A., provides that the only court having jurisdiction to grant such relief is the District Court of the United States in the district in which said contract was to be performed "and not elsewhere." Hence, the court below could not grant relief to the creditors on the bond and they could not be compelled to take substituted relief.

It is doubtful whether or not the laborers and materialmen could in a legal sense have been parties to this suit for the reason that the obligee in the bond

was the United States. Both the construction company and the plaintiff, by the terms of the bond "are held and firmly bound unto the United States of America, hereinafter called the 'Government'" (Tr. 61-62).

No other obligee is nominated in the bond.

In *United States Fidelity & G. Co.* v. *United States*, 204 U. S. 349, 51 L. Ed. 516, it was held that the United States is the real and not merely the nominal plaintiff in a suit authorized by the act of Congress in question to be brought in its name for the use and benefit of the materialmen upon the bond of a contractor for a public work, which the statute required should contain the specific special obligation directly to the United States, that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work. Said the court:

> "The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions."
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> • • • • • • •
>
> "* * * the statute required that, in addition to a penal bond in the usual form, one should be taken that would contain the specific, special obligation directly to the United States that the contractor or contractors 'shall promply make payments to all persons supplying him or them labor and materials in the prosecution of the work.' The government is a real party here."
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> • • • • • • •

> "* * * the United States is a real, and not a mere nominal, plaintiff in the present action."

The opinion in that case had to do with the contract entered into before the amendment of the statute in 1905. The court held that its view that the United States was a real party and not a nominal party was strengthened by the Act of 1905, providing that after the completion of the contract, the person supplying labor or material to the contractor:

> "* * * shall have a right of action, and shall be and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, *irrespective of the amount in controversy in such suit*, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

The court further said that the Statute of 1905:

> "* * * tends to sustain the view based on the latter act, namely, that, in suits brought in the name of the government for their benefit, the United States is a real litigant, not a mere nominal party."

From the foregoing, it follows that the United States was the creditor who should have been made a party to the use of persons supplying labor and material. But under the rule stated in *Maryland Casualty Co.* v. *Charleston Lead Works*, 24 F. (2d) 836, the United States has not consented to be sued in the court below in this sort of case. Hence, the court

below, as it was outside the district where the contract was performed, did not have and never could have jurisdiction to grant the relief of exoneration under the existing laws.

In the opinion below it is said: "—there can be no exoneration except from *an existing liability against the surety.*" This is also the result of the cases as we read them. But a statute (40 U. S. C. A., Sec. 270) controls the *beginning of the liability of the surety.*

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> "This statute has been construed to the effect that there is no *liability or cause of action against the surety until the expiration* of the six months period mentioned."

By virtue of that statute there could be no existing liability in the Western District of Missouri on the bond to any creditor. The liability could not exist save and excepting on the conditions named in the statute. In *Texas Cement Company* v. *McCord,* 233 U. S. 157, the court said:

> "The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

In *Metropolitan Surety Company*, 211 N. Y. 107, it is said:

> "The claimant could reach the surety company *through the bond alone*, which with the statute a part of it, defines and limits the rights of the claimant as against it, and the methods *and tribunals* through which those rights might be enforced. This right of action against it through any form of legal proceeding was created by the bond and the statute and must be enforced pursuant to the terms and conditions of the statute and *not otherwise*. * * * It was, however, a qualified and conditional, and not an absolute right or cause of action. An Act of Congress which at the same time and in itself authorizes or creates a new cause of action and prescribes the limitations thereof and of its enforcement makes these limitations conditions of the liability itself. Such an act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the right it creates, because they are parts of or elements in the right itself and not limitations of the remedy only. The limitation of the remedy is a limitation to the right."

The liability of the surety on the bond could arise only after the six-months period and could be enforced only in the "United States Court of the district in which said contract was to be performed and executed * * * and not elsewhere" so that the surety could not be liable on the bond "elsewhere." It is said that "elsewhere" may be somewhere east of Suez, but there could be no liability on the bond in any place known as "elsewhere." It could exist only in the district where the "contract was to be performed and executed." It may be therefore that after the cause of action accrued the

surety could have exoneration in any court in that district, state or federal, because the liability would *exist* therein. But according to the statute the liability on the bond could not exist or be enforced "elsewhere." Hence the right to exoneration could neither exist nor be enforced "elsewhere."

XIII.

Plaintiff's suit was brought before a cause of action accrued and should have been dismissed.

> "A demurrer will be to a bill which appears on its face to have been filed prematurely, before plaintiff became entitled to enforce his right."
>
> 21 C. J. 437.
>
> *Kryptok* v. *Housmann & Co.*, 216 Fed. 267.
>
> *Texas Portland Cement Co.* v. *McCord et al.*, 233 U. S. 157.

In *American Bonding & Trust Company* v. *Gibson County*, 145 Fed. 871, the late Mr. Justice Lurton wrote a terse, learned dissertation upon the question here presented. Under that authority the trial court should dismiss a case prematurely brought when no cause of action has yet accrued. The syllabi in that case are as follows:

> 1. A plaintiff's right to recover depends upon his *right at the inception of the suit*, and the nonexistence of a cause of action when the suit was begun is a fatal defect, which cannot be cured by the accrual of a cause of action pending suit.
>
> 2. Where a judgment against a building contractor and his surety was reversed because of the failure of the plaintiff to allege or prove that its claim had been audited and certified by the architect, which, under the terms of the contract, was essential to give a right of action, or that such cer-

tificate had been wrongfully refused, the action could not be sustained upon an amendment of the declaration showing that such certificate was procured after the reversal, but without alleging that it had previously been refused.

In this case there was an agreement between the contractor and Gibson County to the effect that the claim should be audited and certified by the architect before a cause of action could accrue. Said the court (l. c. 873):

> "The plain meaning of that part of Article 5 of the agreement applicable to the facts of this case was that the contractors and their surety should only be liable for the expense of finishing the building, and for the damages provided for delay due to the default of the contractor when such cost and damage over and above the contract price should be audited and certified by the architect. Until that was done, no right of action under the fifth clause of the contract accrued, and this construction of the contract was the law of the case from which the court below was not authorized to depart.
>
> "Plaintiff's suit was prematurely brought, and no amendment declaring upon a cause of action which did not exist when the suit was commenced would cure such a defect. If no cause of action existed when the suit was started there was nothing to amend, and when this fact appeared, and objection was made, the suit should have been dismissed without prejudice to an action upon the cause of action which did accrue when the architect audited the claim. It was not a case of a cause of action defectively stated. Such a defect is amendable. Neither was it a case of a new cause of action brought in by amendment, which existed when the suit was brought. It was an effort to declare and recover upon a cause of action which arose pending the suit.
>
> "Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the

nonexistence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit. *De Mattos* v. *Jordon*, (Wash. Dec. 6, 1898) 55 Pac. 118; *Hollingsworth* v. *Flint*, 101 U. S. 591, 596, 25 L. Ed. 1028; *Wadley* v. *Jones*, 55 Ga. 329; *Moon* v. *Johnson*, 14 S. C. 434; *Linn* v. *Scott*, 3 Tex. 67; *Wetherell* v. *Evarts*, 17 Vt. 219; *Jennings* v. *Zerr*, 48 Mo. App. 528; *Turner* v. *Pierce*, 31 Wis. 342; *Bell* v. *Bullion*, 2 Yerk. (Tenn.) 479; *Carter* v. *Turner*, 2 Head (Tenn.) 52; *Robinson* v. *Grubb*, 8 Baxt. (Tenn.) 19; *Pigue* v. *Young*, 85 Tenn. 263, 1 S. W. 889; *Blevins* v. *Alexander*, 4 Sneed (Tenn.) 588. In *Bell* v. *Bullion*, cited above, it was held that prematurity of suit was ground for arrest of judgment when the fact appeared upon the record. In *Carter* v. *Turner*, cited above, it was held to be a matter in abatement or demurrer according as the fact appeared or not upon the record. To the same effect are *Hovey* v. *Sebring*, 24 Mich. 232, 9 Am. Rep. 122; *Weirnwick* v. *Bender*, 33 Mo. 80; *Storm* v. *Livingston*, 6 Johns. (N. Y.) 45; *Dean* v. *Metropolitan R. Co.*, 119 N. Y. 540, 23 N. E. 1054; *Scott* v. *Fowler*, 14 Ark. 427; *Barnes* v. *Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210. When prematurity appears, the suit should be dismissed without prejudice to the right to institute a suit upon the cause of action when mature. 16 Ency. Pl. & Pr., p. 875; *Loomis* v. *Donovan*, 17 Ind. 198; *Durgee* v. *Turner*, 20 Md. App. 34; *Green* v. *De Moss*, 10 Humph. (Tenn.) 371, 377."

A somewhat similar case is that of *Eveland* v. *Detroit Machine Tool Co.*, 18 F. (2d) 986, where the court said (l. c. 969, 970):

"Although courts in general, and this court, should be, and are, liberal rather than strict in allowing amendments to pleadings in the furtherance of justice, yet it is a fundamental, essential element of an amendment to a declaration that such amendment

must relate to the time of, or prior to, the filing of such declaration. In the language of Judge Lurton, speaking for the court of appeals for this circuit, in *American Bonding & Trust Co.* v. *Gibson County*, 145 Fed. 871, at page 874 (7 Ann. Cas. 522): 'Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the nonexistence of a cause of action when a suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit.' *United States* v. *McCord*, 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893; *Emerson* v. *Hubbard*, (C. C.) 34 Fed. 327; *American Bonding & Trust Co.* v. *Gibson County, supra; Bush* v. *Pioneer Mining Co.*, 179 Fed. 78 (C. C. A. 9); *Mono County* v. *Flanigan*, 130 Cal. 105, 62 Pac. 293; *Correll* v. *Georgia Construction & Investment Co.*, 37 S. C. 444, 16 S. E. 156; 31 Cyc. 391; 1 Corpus Juris 1149.

"This principle is applicable not only to a case where the suit as originally commenced is not supported by any valid cause of action (*United States* v. *McCord, supra; American Bonding & Trust Co.* v. *Gibson County, supra*), but also to a case where, as here, it is sought to add, by amendment, a cause of action acquired by the plaintiff after the commencement of the suit to a cause of action on which such suit has already been commenced (*Mono County* v. *Flanigan, supra; Correll* v. *Georgia Construction & Investment Co., supra*), and specifically, to a case involving the same kind of a patent suit and situation as are presented here (*Emerson* v. *Hubbard, supra*). It may be added that this is not a case where the only effect of the amendment, if allowed and proved, is to perfect an inchoate, but not perfect, title asserted in the suit as originally commenced, and cases, and the principle therein involved, presenting that sort of a situation are not applicable here.

"For the reasons stated, the motion of plaintiff for leave to file the proposed amended declaration referred to must be denied."

XIV.

A surety participating in the default of any person connected with the principal and suretyship relation forfeits all right to relief of any kind.

The authorities below state the applicable principle:

Broussard v. *Wasson*, 187 M. A. 281, 173 S. W. 698.

Eshleman v. *Bolerius*, 144 Pa. 269, 22 A. 758.

Block v. *Estes*, 92 Mo. 318, 4 S. W. 731.

Crisfield v. *Murdock*, 127 N. Y. 315, 27 N. E. 1046.

Wilder v. *Butterfield*, 50 How. Pr. 385.

McCrory v. *Parks*, 18 Oh. St. 1.

In re Koch, 148 Wis. 548, 134 N. W. 663.

XV.

Plaintiff's reply asserted that the only purpose of its complaint was to have the contract specifically performed. This was a solemn admission of record withdrawing its claims for all other relief and was binding on the court and hence the decree of the trial court granting exoneration was based upon an abandoned issue and is therefore outside the issues and is void.

Reynolds v. *Stockton*, 140 U. S. 254, 35 Law Edition 464.

Munday v. *Vail*, 34 N. J. L. 418.

Both cases say:

"* * * a decree in equity, which is entirely aside of the issue in the record, is invalid, and will be treated as a nullity, even in a collateral proceeding."

XVI.

Even if Exhibit "A" had constituted the entire contract between the parties yet since the uncontradicted evidence established that the decree of the trial court and the judgment of the circuit court of appeals both tied up all the assets of the construction company and prevented it from recovering claims against defaulting subcontractors and their bonding companies in the sum of approximately $42,000.00 and prevented it from making a defense against excessive claims the decrees in both courts were harsh and oppressive and inequitable and cannot stand.

It is undenied that the decree of exoneration granted by the trial court and the decree of specific performance specified in the opinion and decision of the circuit court of appeals has heretofore operated and in the future will operate to deprive the Morley Construction Company of its right to enforce claims amounting to $42,000.00 against subcontractors and their sureties. The decisions of both the lower courts ignore the limitations on the discretion of courts of equity, especially with reference to the harsh or oppressive effect of a decree of specific performance or exoneration.

In *Caldwell* v. *Ins. Co.*, 124 Tenn. 593, it is said:

> "The remedy of specific performance is governed by the same rules which control the administration of other equitable remedies; the right to it depends upon elements, conditions and instances, which equity regards as essential to its peculiar modes of relief. He who seeks equity must do equity, and he who comes into equity must come with clean hands. The contract must be perfectly fair, equal and just in its terms and in its circum-

stances. The contract and situation of the parties must be such that the remedy of specific performance will *not be harsh or oppressive.*''

In 58 C. J. 850, it is said:

> ''* * * remedy must not be harsh in its operation on defendant or others'' (citing *Willard* v. *Tayloe,* 8 Wall. 557, 19 L. Ed. 501).

In *Willard* v. *Tayloe,* this court said:

> ''It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, *would work hardship or injustice to either of the parties* * * *
>
> The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; *and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties.*''

The trial court and the circuit court of appeals wholly ignored the right of the defendant construction company to recover from the defaulting bonding companies and subcontractors. It thus appears that the courts below determined to find for the respondent un-

der any and all circumstances doubtless upon the theory that the same rule should be applied which would apply to protect a voluntary surety who received no consideration for the contract of suretyship, but herein the defendant was a compensated surety. It sold its credit to the contractor for a consideration and then withdrew that credit at the very time that the contractor needed it and consequently it breached its contract of suretyship. Had the surety not violated its contract of suretyship by bringing those suits, then there cannot be any question that as stated by the evidence on record pages 107-108 they would have, if permitted by the surety, utilized their resources to take care of all their obligations and it appears on said pages that it was necessary for the construction company to be permitted to prosecute its claims against these defaulting casualty companies and subcontractors in order to take care of its obligations as principal for the laborers and materialmen and so if ever there was an instance in which a decree of specific performance or what was tantamount to the same—the decree of exoneration operated harshly, inequitably and unjustly.

XVII.

The circuit court of appeals not only appropriated to itself the discretion which belongs to the trial judge but it also declined to follow the general rule on the subject which prohibits a court of equity as well as a court of law from exercising any discretion whatsoever with reference to the ultimate property rights of a litigant.

In *Hennessey* v. *Carmony,* 50 N. J. Equity 616, l. c. 625, Vice Chancellor Pitney, later a justice of this court, said:

> "If by 'discretion' is here meant that the judge must be discreet, and must act *with* discretion, and discriminate, and take into consideration and give weight to each circumstance in the case, in accordance with its actual value in a court of equity, then I say that that is just what he must do in every case that comes under his consideration—no more and no less. And that is the sense in which I understand the word is used in *Demarest* v. *Wardham*. But if the word 'discretion' in this connection is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling property rights, *at* his discretion, without the restraint of the legal or equitable rules governing these rights, then I deny such power. It seems to me that the true scope of the exercise of this latter sort of discretion in the judicial field is found in those matters which affect procedure merely, and not the ultimate right."

The opinion and judgment of the circuit court of appeals is in conflict with the principles stated by Mr. Justice Pitney in the above opinion which properly states the general law on the question and discloses a conflict between the opinion of the circuit court of appeals and the general law, and therefore, necessitates a reversal of the judgment of the circuit court of appeals.

Section 35 of Pomeroy's Specific Performance of Contracts says:

> "The granting of this equitable remedy is a matter of discretion; not, indeed, of an arbitrary capricious discretion, synonymous with the mere pleasure of the judge, but a sound, judicial discretion controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case."

In *Willard* v. *Tayloe*, 8 Wall. 557, the court said:

> "The discretion which may be exercised in this class of cases is not an arbitrary and capricious one depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and principles of equity."

XVIII.

Even if Exhibit "A" were held to be the entire contract, yet its purpose had been accomplished when the building was completed and hence there was no necessity for a decree of specific performance.

The only purpose of Exhibit "A" is that shown therein (Rec. 10, 12). And also that shown in Record 12 and Record 13 and 77, 78. These documents in themselves disclose that because of the failure of the subcontractors to perform due to strikes and labor troubles, that the construction company needed assistance merely to help it take care of the plastering contract. The agreement was made to take care of that, only and to vest a property interest in the claim against the government contrary to the statute, R. S. 3777. It did not extend to laborers or materialmen in general. Exhibits "A" and "B" make no mention of any other purpose. In determining what is meant by parties to an agreement, the apparent purpose must be considered. *Van Sickle* v. *Arsuaga*, 231 U. S. 601; *Mobile, et cetera, Oil Company* v. *Jurey*, 111 U. S. 584, 240 West. 358. The court of appeals in its opinion thus interprets Exhibit "A" for it says (Rec. 133):

> "The contract, Exhibit 'A,' was entered into for the purpose of extricating the defendant, Morley Construction Company, from financial difficulties in connection with the construction contract, and for

> completing the construction contract. This was the purpose of establishing the joint account provided for in Exhibit 'A.' *This purpose was accomplished.* The *construction contract was completed* to the satisfaction of the United States Government, and final payment ordered."

In view of the foregoing finding by the circuit court of appeals to the effect that Exhibit "A" was entered into only with reference to the *construction* feature of the contract and not with reference to the feature of the performance having to do with promptly making payment to laborers and materialmen, it is difficult to understand how the court of appeals could have determined that the Maryland Casualty Company was entitled to a decree directing the trial judge to decree specific performance of a contract which had already been performed. If Exhibit "A" was for the purpose of completing the construction contract, and if this purpose was accomplished, then it would have been a wasteful and ridiculous excess to go further. It was wholly unnecessary to give the Maryland Casualty Company the benefit of the extraordinary relief of specific performance, especially in the light of the fact that the construction company had no officer or agent at Buffalo, New York, and in the light of the fact that it was necessary in the disbursement of the fund to have the construction company officials exercise their discretion with reference to the payment of all bills.

A reversal with appropriate directions is again prayed.

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Attorneys for Petitioners.

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SEP 1936

CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 325

MORLEY CONSTRUCTION COMPANY, A CORPORATION, AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, A CORPORATION, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JOHN C. GROVER,
Attorney for Respondent.

SPENCER F. HARRIS,
PAUL G. KOONTZ,
Of Counsel.

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

A.

Summary Statement of Matter Involved.

An amplification of portions of the summary statement contained in the petition for writ of certiorari filed by the petitioners will clarify the issues involved and the decisions which have been rendered in this cause. In

such statement the only reference to the bill of complaint is the statement that it was alleged by the complainant that the construction company intended to use the proceeds from the voucher involved for purposes other than paying the labor and material claims, and that the construction company intended to conceal and fraudulently convey the same. The complaint alleges that at the time of the execution of the agreement, plaintiff's Exhibit 3 (R. 57), the Morley Construction Company notified the surety company that it was involved in financial difficulties as well as disputes of laborers, and that it was unable to proceed with the construction of the building unless the plaintiff would furnish to defendant, Morley Construction Company, advances or money for the purpose of completing said work (R. 3); that it further alleges that at the time of the filing of the bill there were outstanding unpaid accounts for labor and material in the amount of $107,000.00, which it was the obligation of the construction company to pay out of the funds derived from the contract, being the warrant for $59,780.22, which said amount the complaint alleges was improperly received by the construction company and converted to its own use (R. 6). The petition further alleges that the defendant, Morley Construction Company, was involved in other financial complications and was wholly insolvent, and the prayer was that this particular fund, representing the last payment on the contract price, should be impressed with a lien and trust to the end that it should be applied in payment of bills for labor and material and to accomplish that end, prayed either that specific performance be had of the agree-

ment provided for its disbursement for those purposes, or that the Court grant the same relief by way of exoneration by directing and ordering the construction company to use such fund for such purposes (R.8).

The motion to dismiss the proceeding, which was filed by petitioner in the District Court was by the Court overruled before the trial of the case.

In referring to plaintiff's reply (page 5, petitioner's application) in which the statement was made that the respondent in the reply stated "that the sole purpose of plaintiff's complaint is to require the defendants to deposit said money and to require its disbursement in accordance with said alleged contract." Without the full reply before the Court, the impression might be given that the only relief sought was specific performance. The portion quoted is contained in paragraph 10 of the reply of respondent (R. 33) and is in answer only to paragraph 14 of petitioners' answer (R. 19). The allegation in such paragraph 14 of petitioners' answer in the District Court, was the allegation that it was none of the business of the respondent from what source petitioners derived the money from which the outstanding bills were to be paid, and therein assert that the wrongful action of the plaintiff (respondent) in preventing the Treasurer of the United States from paying the said check to the defendant, Morley Construction Company, rendered the construction company powerless to use such money for any purpose, and powerless to carry out the alleged contract to deposit money in the M. & T. Trust Company as provided in the escrow agreement. The reply, as contained in paragraph 10 thereof (R. 33), was in

answer to this paragraph 14 of the answer, and sets out in answer to the allegation that the plaintiff, respondent, was seeking to and was preventing the application of such proceeds for the payment of labor and material bills. Such paragraph 10 follows (R. 33):

> "10. Plaintiff for reply to paragraph 14 of said answer denies that the plaintiff was guilty of any wrongful action in preventing the Treasurer of the United States paying the said check to the said defendant, Morley Construction Company, and denies that plaintiff has prevented the defendant, Morley Construction Company, from receiving said money and has rendered said defendants, and each of them, powerless to use said money for any purpose, and powerless to enable said defendant, Morley Construction Company, to carry out its alleged contract to deposit said money with M. & T. Trust Company, but on the contrary, states that the sole purpose of plaintiff's complaint is to require the defendants to deposit said money and to require its disbursement in accordance with said alleged contract, and the plaintiff at all times since said action was and is now anxious and willing that the said money be deposited and disbursed in accordance with said contract, Exhibit 'A.'"

On page 5 of the petitioners' application, it is stated that the testimony developed in the trial that the assets of the Morley Construction Company exceeded its obligations by $23,598.84. In connection with the testimony of Mr. Morley, president of the petitioner, the plaintiff offered in evidence two lists of the then outstanding unpaid bills for labor and material. The first list totaled $90,771.34 (R. 55). The additional list, being plaintiff's Exhibit 2, showed an additional amount of $989.79 (R. 57), making a total of $99,861.13. In addition to these amounts, the

testimony of Mr. Morley showed that the company had borrowed from a bank the sum of $5,000.00; that the company was indebted to the Maryland Casualty Company by reason of advancements in the sum of $10,700.00; that it owed to the Maryland Casualty Company for premiums approximately $4100.00 and to the Ithica Trust Company the sum of $3,000.00, making an additional amount of $22,800.00 owing by the construction company (R. 56). This added to the total represented by the two lists, according to the testimony of the president, Morley, was $122,661.13. At the trial there was also introduced a statement of unpaid bills for labor and material, which was furnished by the construction company to the surety company listing amounts due to various labor and material claimants totaling $107,666.23. This list did not include the additional items of $22,800.00 hereinbefore recited, and which added to the list totaling $107,666.23 (being plaintiff's Exhibit 6, R. 85) made a total of outstanding indebtedness previous to the bringing of this suit, according to petitioners' own testimony, of $130,466.23. The total amount claimed by petitioners as assets, including the two large unliquidated claims against the New Amsterdam Casualty Company and its principal, and against Moody L. Rupp, totaled $42,791.00. The only actual assets or liquid assets of the company (petitioner) was the sum of $7,666.66 remaining on deposit in the account at Buffalo and the warrant for the balance of the contract price of $59,780.22. Applying this amount in liquidation of the claims as disclosed by the two exhibits 1 and 2, of the plaintiff, that is, subtracting it from the total indebtedness of $122,661.32, there remained unpaid claims of

$55,901.13 for the payment of which the company (petitioner) claims to have had assets including the two unliquidated claims, which, if collected and applied, failed to amount to sufficient to pay the admitted claims by the sum of $12,986.13.

Adopting the figures as represented by the list of outstanding claims given to the surety company by the construction company before the trial of the case, which totaled the sum of $130,466.23, and applying to the payment of these the money in the bank and the money represented by the warrant for the unpaid contract price, $66,760.00, in reduction of the outstanding claims, it still left outstanding the sum of $63,706.23, and assuming the collection in full of the total outstanding claims of the construction company, including the large unliquidated claims amounting to $42,791.23 in reduction of the remaining unpaid claims, it still left outstanding claims to the amount of $20,915.00 for which there were no assets or means of payment, instead of a surplus of assets in the amount of $23,598.84 as set out on page 5 of the application.

In the reference to the findings of the District Court shown on pages 6 and 7 of the petitioners' application, are set out excerpts. The full paragraph first shown reads as follows:

> "While it was not the intention of the construction company, nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in finding of fact No. 4 for any other purpose than the payment of labor and material claims upon the Batavia contract, the casualty company had reason to apprehend that such was their intention."

In this connection, and apparently overlooked by the trial court, was the statement of counsel as to what the construction company had in mind, shown on page 108 of the record as follows:

> "Mr. Ellison: However, Your Honor, since he has stated what they are willing to do, we offer to deposit this money in the First National Bank here, or any other bank, together with a list of all bills payable on this job, with instructions on the bank that no checks should be paid except in the reduction or settlement of one of those bills, and the further provision that any expenses of prosecuting these claims against defaulting contractors or the government should also be paid from this fund."

In this connection the Court found (R. 116) that on or about April 28, 1933, the construction company became involved in financial difficulties and was unable to proceed with its contract without pecuniary aid from the casualty company, and that thereupon the contract of April 28, 1933 (R. 57) was entered into, by which, as construed by the Court, it was intended and understood by the parties to the agreement, and it was a part of that agreement that the monies received from the United States should be so deposited and should include the final payment under the contract made by the United States and the construction company, as well as all other payments under the contract made by the United States after April 28, 1933 (R. 117). The Court further found (R. 117) (paragraph 4):

> "By direction of the construction company and notwithstanding the agreement referred to in Finding of Fact No. 2, the United States sent its warrant on the Treasury for $59,780.22, not to the M. & T. Trust

Company, Buffalo, as other warrants had been sent after an agreement was entered into, but to the construction company at Kansas City, Missouri."

The Court further found (R. 118):

> "At the time the agreement referred to in Finding of Fact No. 2 was entered into between the construction company and the casualty company, the construction company was insolvent, and it was insolvent when the bill in this case was filed. 'When the bill in this case was filed, there were claims against the construction company for labor and materials furnished on its Batavia contract in an amount exceeding $100,000.00, which were due and payable.'"

The District Court in its opinion found (R. 119):

> "But the plaintiff is entitled to exoneration by the defendant. When its bill was filed, the claims against defendant of those who had furnished labor and materials on the Batavia contract in the amount of more than $100,000.00 had matured and were due and payable. Immediately they became due, the plaintiff's liability arose. Contemporaneously with the beginning of liability, its right of exoneration came into being. 'No principle in equity is more familiar or more firmly established than that a surety after a debt for which he is liable has become due, without paying or being called on to pay, it may file a bill in equity in the nature of a bill *quia timet* to compel the principal debtor to exonerate him from liability.'"

The decree of the Court (R. 35) gave to the defendant relief as prayed, both under the prayer for specific performance and under the prayer for exoneration, in that it ordered a decree that this particular money, which under the contract of April 28, 1933, was to be deposited in the M. & T. Trust Company for the payment of labor and material bills, should be deposited

in some bank as a special trust fund for the payment of all bills for labor and material used on the United State Veterans Hospital in Batavia, New York, electing to place the right under the doctrine of exoneration rather than decreeing a specific performance for the reason as stated in the opinion, that the plaintiff itself had not discharged all its obligations under that agreement (R. 118). The agreement of April 28, 1933, provided (R. 58):

> "First: The Morley Construction Company hereby agrees to deposit in the M. & T. Trust Company in the City of Buffalo, New York, the sum of five thousand ($5,000.00) dollars and to deposit from time to time certain other sums of money to be used toward the completion of said contract . . ."

It also provided:

> "Fifth: The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plasterers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient money to complete the Giamberardino plastering contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory to the Maryland Casualty Company."

The Morley Construction Company did not as in said agreement provided "deposit from time to time certain other sums of money to be used toward the completion of said contract." The Maryland Casualty Company did not deposit in said fund "sufficient money to complete the Giamberardino plastering contract." No point was made of this failure on the part of either, and these requirements on the part of each were apparently mutually abandoned as will be shown by the reference in the opinion of the Circuit Court of Appeals.

Upon appeal, the case was affirmed and the same order given in effect as that which had been given in the original decree of the District Court. The Circuit Court of Appeals in its discussion of the right of exoneration under which the relief was given by the District Court, discusses the question as to whether or not the time had arrived for the application of the doctrine of exoneration and states (page 9 of its opinion): "We are in grave doubt whether exoneration can properly be granted." The Court fully goes into the question of specific performance and referring to the opinion of the lower court states (page 5 of the opinion):

> "As conclusions of law the Court found:
>
> " 'Plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. . . .'
>
> "We cannot agree with this conclusion of the trial court.
>
> "Acquiescence by defendant in a modification of the contract Exhibit 'A,' which modification was, thereafter, carried out, deprives the conduct of the plaintiff of any taint of inequity. *Becker* v. *Becker*, 250 Ill. 117, 95 N. E. 70; *Langley* v. *Devlin*, 95 Wash. 171, 163 Pac. 395.
>
> "Such acquiescence, we think, was shown by the evidence in the case at bar."

The Court of Appeals thereupon affirmed the decision with directions to the District Court to enter up a decree of specific performance, stating, after discussing the question of exoneration:

> "It is conceded that the six months' period had not expired in the case at bar.
>
> "For this reason, we have preferred not to place the relief to be granted on the basis of exoneration, but rather on the basis of specific performance of the agreement, Exhibit 'A.' "

RESPONSE TO PETITIONERS' REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

I.

The assets impounded by the decree of the District Court were funds derived from the contract covered by respondent's bond, and under the agreement with the parties evidenced by the contract of April 28, 1933, were to be used only for the payment of labor and material bills, and were funds out of which respondent was ultimately entitled to be exonerated. There was nothing in the proceeding to prevent the petitioner, Morley Construction Company, from pursuing any right it had against anyone liable to it. The time for bringing such a suit has not yet expired. The fact that it had made no move to enforce any such right up to the time of the trial of the cause, does not bespeak any great good faith in this contention. There was $7,000.00 in the escrow account which was not in anywise affected by this litigation. Petitioner, Morley Construction Company, was not under any theory entitled to take from this fund agreed to be disbursed in payment of debts for which respondent under its bond was liable, any portion for the purpose of speculating in a law suit over disputed unliquidated claims. The statement that the Morley Construction Company suffered a loss in excess of $42,000.00 is, therefore, entitled to no consideration. The truth of the matter is that the respondent, according to the figures shown by the estimates of Herbert F. Morley, will suffer a loss or be

required to pay bills which, in addition to the money already advanced by them, will exceed this amount. So that if the Morley Construction Company had any claims or counterclaims against certain of the claimants, as indicated in their testimony, the respondent would be subrogated to such rights and entitled to the proceeds of any such claims to reimburse it for the amounts which it will be obliged to pay out.

II.

There is no merit in the contention made by petitioners in Section II on page 9 of their application. They are seeking to treat the contract of April 28, 1933, as an assignment of the fund, and to invoke the provisions of Section 3477 of the Revised Statutes. The respondent had the right, irrespective of any contract, to have the proceeds from this construction contract, applied in payment of bills for labor and material performed and used on the contract, and these contracts of April 28, 1933, only reiterated and designated the method of doing this. The rights of no creditors intervened and the respondent will have to pay whatever creditors there are. So there does not arise the question as in the cases cited by petitioners, of an assignment sought to be enforced prior to the rights of other creditors, and the respondent is not seeking as an assignee to recover direct from the Government. The cases cited have no application, and the situation presented does not involve any asserted right contrary to Section 3477.

III.

In Section III on page 10 of petitioners' application, petitioners are again in another way asserting the contention set out in Section II, and what has been said under paragraph II herein equally applies to this section.

IV.

The position of the petitioners as indicated by Section IV on page 10 of the application, is that the United States Circuit Court of Appeals was without jurisdiction to affirm the decision of the District Court and to give the relief granted on different grounds.

The Court of Appeals is seeking to do justice, and in so doing was exercising the right it unquestionably had in trying the case *de novo,* and in arriving at the result it thought was just, and if it felt that the reasons given by the District Court were not the proper reasons to support the result, it had the right to affirm the judgment of the District Court for reasons other than those given by the judge of that Court.

Mound City v. *Castleman* 187 Fed. 921, l. c. 923; affirmed *Mound City* v. *Castleman,* 235 U. S. 689.
Ramsay v. *Crevlin,* 254 Fed. 813.
4 C. J., p. 726, para. 2647.
Dean v. *Davis,* 212 Fed. 88, l. c. 89.
Shore v. *United States,* 282 Fed. 857, l. c. 860.
Commissioner v. *Bryson,* 79 Fed. (2) 397.
Presidio Mining Company v. *Overton,* 270 Fed. 388.

The cases cited on page 11 of petitioners' application under Section IV are not in point, having to do only

with the rights under cross errors and cross appeals, and not with the right of the appellate court to try the case *de novo* and to determine therefrom the rights of the parties.

V.

Under Section V on page 11 of petitioners' application, is raised again the same point as is raised in Section IV, and what is here said under Section IV applies equally to this Section V.

VI.

There was no evidence that the Morley Construction Company repeatedly requested the Maryland Casualty Company to perform its contract and place sufficient money in the joint account to complete the plastering contract. The Court of Appeals commented on the testimony on this point and quoted it in its entirety in its opinion. The evidence is embodied in the testimony of Herbert F. Morley (R. 76-77) and James Kelly (R. 88). The sum and substance of the testimony was that when the first monthly estimate became due, Morley asked Kelly, representing the surety company, for money to pay the first month's work by the Hudson Plastering Company, and was advised to pay it out of the joint account. Nothing was said by Kelly as to whether or not the surety company would carry out its contract. When the next month's payment came due, Morley requested that money be advanced to meet it, and Kelly suggested that it be paid out of the joint account, and Morley did

pay it out of the joint account. A few days later when Morley discussed the matter with Kelly, he, Kelly, made the remark that the Maryland Casualty Company was not going to put any more money in that account. Morley made no further demand upon Kelly for payment (R. 76-77). Kelly testified that at the time an estimate came due, he asked Morley if he was going to pay it out of the estimate and Morley did ask him to pay the Hudson claims, and he told him to pay it out of the estimate coming due (R. 88). No question ever arose afterwards concerning this obligation of the Maryland Casualty Company, and Morley Construction Company never, after signing the contract deposited money in the joint account from "time to time" for the purpose of carrying on the contract. The estimates coming in were apparently sufficient to carry on the contract, and these obligations were mutually abandoned, or by mutual consent were not insisted upon.

The Court of Appeals so found and the cases cited under this section do not hold to the contrary. These cases hold that parties to a written contract may not by parol or subsequent action add to the obligations of the contract, but do hold that the parties by parol agreement or subsequent action may waive the performance of conditions in the contract. As the Court of Appeals (p. 5), in its opinion in discussing this question of acquiescence in the modification of the contract by eliminating certain affirmative requirements, says:

> "Such acquiescence, we think, was shown by the evidence in the case at bar."

VII.

An examination of the cases cited by petitioners under Section VII on page 13 of their application, will disclose that the decision of the Court of Appeals was not in conflict with any of these cases.

VIII.

The action of respondent in tying up the proceeds of the voucher involved was not in anywise in violation of any duty imposed upon the Maryland Casualty Company as surety. It was in nowise a breach of the performance bond executed on behalf of the Morley Construction Company, and was simply an attempt to enforce the right which the surety company had to have these funds applied to the payment of bills for labor and material on the contract. It was an attempt to prevent what the Morley Construction Company afterwards admitted was its intention (R. 180), to divert part of these funds for purposes other than those for which it was agreed the funds should be used.

IX.

The reasons set out in Section IX on page 14 of petitioners' application, state no reason sufficient to support the contention. The agreement, Exhibit "A" (R. 9), was the contract entered into between the Morley Construction Company and the Maryland Casualty Company providing for the deposit of the monies from the contract in the M. & T. Trust Company. The contract,

Exhibit 3, was but a direction by both parties to the original contract addressed to the M. & T. Trust Company in which the original contract provided the funds should be deposited, as to the manner of its disbursement. There was no change or modification of any kind in the contract. After the deposit arrangements had been in existence some two months and on June 21, 1933, the name of Herbert F. Morley, President of the Morley Construction Company, was substituted in the account in the M. & T. Trust Company for that of the Morley Construction Company. This apparently was done to expedite the handling of the fund and was not in anywise a modification of the contract.

X.

Under Section X on page 14 of petitioners' application is raised the question as to the jurisdiction of the District Court in this case, the contention being that it involved property not within the jurisdiction of the Court. This is an equity action which does not directly involve any property but simply involves the right of the Court to direct the officers of the Morley Construction Company who were within the jurisdiction of the Court, to do certain things, and is a proceeding *in personam* and not *in rem*, and so long as the Court has jurisdiction of the individuals it had jurisdiction to make any order that it saw fit as affecting the individual actions or directions to these individuals. This exercise of jurisdiction is so common as to require no further comment or cita-

tion of authorities. The case cited under this section by petitioners does not anywise change this doctrine.

XI.

Under Section XI on page 15 of petitioners' application is raised for the first time the question of the failure to have the M. & T. Trust Company made a party to the suit, and the failure to make the employees Kelly and Schaus parties to the action. There is nothing in this contention as the action was designed to require the petitioner, Morley Construction Company, to perform its contract and its duty. There was no refusal or disinclination on the part of the M. & T. Trust Company, which was merely a depository, to perform any obligation imposed on it and there was no necessity or propriety which required it to be a party to the action. Employees of respondent, of course, were neither necessary nor proper parties. The respondent was in Court and through it every employee which it had. The cases cited under this section are not applicable to the situation here.

XII.

The Maryland Casualty Company was not asserting any rights to use the proceeds from the contract price in any manner that it saw fit, but was only seeking to have the Court direct the application of the funds in the manner provided for in the contract between the parties and in accordance with its right as surety on the project involved.

XIII.

The statement of petitioners in Section XIII on page 16 of the application appears to be incomplete, petitioners apparently attempting to state the proposition that this Court has the right to review this action of the Court of Appeals as a matter of discretion.

We find nothing in any of the reasons given by petitioners in their application for a writ of certiorari to justify or to impel a review of the action of the Circuit Court of Appeals. There is involved no matter of importance, nor is there involved any conflict with other decisions for which a certiorari might issue. It simply involves the attempt by petitioners to in effect appeal from the decision rendered by the United States Circuit Court of Appeals. It is a request for the Supreme Court to review the evidence and to discuss specific facts already presented to and decided by the Court of Appeals, and to prolong a litigation which has already extended beyond any reasonable time. The only purpose hoped to be accomplished by petitioners would be that the case would be sent back for a retrial because the right of exoneration was granted by the Court within six months after the completion of the contract when petitioners contend that the right to exoneration did not arise until the time arrived at which the labor and material claimants might file their suit against the surety company. The only effect would be to again try the issue which has already been tried and decided so that the Court might at a subsequent hearing grant the same relief which it had granted at the original trial. Petitioners have not seriously

contended that the right of exoneration does not exist, but in fact concede such right except for the claim that the time for its exercise had not arrived when the original suit was brought. Petitioners would gain nothing by such action except cause a postponement to respondent of its relief under the right of exoneration and could not hope under the evidence offered and which would be the same evidence in a new trial to obtain any relief of any benefit to it.

ARGUMENT.

The responses herein made to the reasons given by petitioners in their application for their prayer for the issuance of a writ of certiorari, sets out the position of the respondent and as counsel see it, plainly show why the writ should not issue and respondent desires only to supplement that as follows:

I.

In subdivision I of petitioners' argument on page 22 is presented an argument addressed to the reasons set out in paragraphs IV and V on pages 10 and 11 of the application, and attacks the right of the Circuit Court of Appeals to grant the relief which the District Court had granted for reasons other than those upon which the District Court based its granting of the relief. We think there can be no doubt as to the position of the Circuit Court of Appeals as evidenced by its decision or of its right to so decree. It was seeking to do justice and in

doing so, it was exercising the right which it unquestionably had trying this case *de novo,* and in arriving at the result which it thought was just, and if it felt that the reasons given by the District Court were not the proper reasons to support the result, it had the right unquestionably to affirm the judgment of the Court for reasons other than those given by the district judge. The decisions referred to in the argument of the petitioners have to do with a discussion of rights involved in the taking of cross appeals and in the assignment of cross errors. They do not attempt to say that the Court of Appeals could not in an equity case determine the matter anew, and to grant the relief which the Court of Appeals thought the respondent was entitled to even though in doing so the reasons given were different from those assigned by the District Court.

Judge Walter Sanborn in the Circuit Court of Appeals for the Eighth Circuit, in the case of *Mound City* v. *Castleman,* 187 Fed. 921, l. c. 923, clearly states this right in the Court of Appeals:

> "The proceedings in this suit have been many and tedious. An original bill, two supplemental bills, pleas, answers, exceptions to answers and numerous rulings in the progress of the cause have presented favorable opportunities for alleged errors that counsel for appellant has not failed in his assignment to specify, and to take every possible advantage of. But an appeal in a suit in equity invokes a trial of the case *de novo* by the appellate court and demands, where that is possible, a just and final decision. When, therefore, the record clearly shows that the decision below was right, and that alleged errors, if

they existed, could not affect adversely to the appellant, the final result, the decree must be affirmed."

This case was approved by the Supreme Court in 235 U. S. 689.

The same holding appears in the case of *Ramsay* v. *Crevlin,* 54 Fed. 813, l. c. 821, decided also by Judge Walter Sanborn.

The rule is generally stated in 4 Corpus Juris, page 726, para. 2647, as follows:

> "Under the old chancery practice, and usually under the codes of procedure, suits in equity are tried *de novo* on appeal upon the entire record and evidence. The appellate court itself will sift the whole evidence and determine what the finding of the trial court should have been upon such evidence as was competent and proper. The court below and the appellate court are judges of both law and fact."

Under this quotation is cited a very large number of cases and it will serve no useful purpose to burden the Court with comment on any of them.

To the same effect is the case of *Dean* v. *Davis,* 212 Fed. 88, l. c. 89, to support which is cited the case of *Erwin* v. *Lowry,* 48 U. S. 172, wherein the Court says:

> "This court must affirm the judgment of the trial court if it finds in the record any reason which it considers sound enough, even though the district judge may have rejected that reason and rested his decree on some other ground. *Erwin* v. *Lowry,* 48 U. S. (7 How.) 172, 12 L. Ed. 665. We are free, therefore, to consider whether the deed to Dean should be annulled as an unlawful preference under Section

60b, although the District Court held that it was not such a preference."

To the same effect are the cases of:

Unkle v. *Wills*, 281 Fed. 29, l. c. 34.
Shore v. *United States*, 282 Fed. 857, l. c. 860.
Commissioner of Internal Revenue v. *Bryson*, 79 Fed. (2d) 397.
Presidio Mining Company v. *Overton*, 270 Fed. 338, l. c. 389.
American Rotary Valve Company v. *Moorehead*, 226 Fed. 202.
Westermann v. *Dispatch Printing Company*, 233 Fed. 609.

Petitioners take the rather peculiar position that the Circuit Court of Appeals could not consider any right respondent might have had to a specific performance of the contract of April 28 1933, because the respondent did not appeal from the judgment in the District Court.

Respondent had nothing from which to appeal except a judgment in its own favor giving to it the relief it sought. An appeal is taken from the judgment of the Court and not from the reasons of the Court in arriving at the judgment and respondent in this case had no cause for complaint on the judgment that was rendered. If the judgment is right although based upon incorrect conclusions drawn from the evidence or upon improper reasoning of the Court in its application of the law, in an equity proceeding the Court of Appeals could correct the judgment of the trial court on what the Court of Appeals conceived to be the correct application of the law in the case on the facts presented even though such conclusions might differ from conclusions drawn by the District Court.

II.

We have discussed this point under Section VI of respondent's response to the similarly numbered section of petitioners' reasons for the certiorari. The Court of Appeals found that the District Judge had taken a mistaken view with reference to the performance or failure of performance of respondent in connection with the contract of April 28 1933. It was the finding of the Court of Appeals that both parties had acquiesced in the abandonment of the enforcement of the two clauses in the contract, one of which required the Morley Construction Company to deposit money from time to time in the escrow account, and the other of which required the respondent to deposit in such account monies sufficient to complete the plastering contract. As stated in our response to this reason, it apparently was unnecessary to do this as the estimates coming in for the work were sufficient to carry on the contract. The Court of Appeals cites two cases, to which referense is made by petitioners in Section VI on page 12 of their application. Petitioners have stated that these cases do not support the Court of Appeals. We take the liberty of quoting from the case of *Becker* v. *Becker,* 95 N. E. 68, l. c. 73 (Ill.), where the Court, after discussing the question and referring to a number of authorities, states:

> "The rule announced in these cases and others in line with them, is too firmly established by the decisions of this Court to be seriously controverted at this time. Conceding the full force of the rule above announced, there is a well-defined distinction between the parol contract which adds to or modifies

the terms of an executory written contract under seal, and a parol agreement made by the parties by which some of the covenants in such written contract are waived by the party for whose benefit such covenants were inserted. Where a party to such written instrument by some affirmative action on his part, induces the opposite party to believe that the strict performance of a covenant will not be insisted upon, or that the same be waived, and such other party fails to perform the covenant through the influence or request of the covenantee, in equity such party shall be estopped to insist that the written contract is no longer obligatory upon him because of the non-performance of such covenant. A waiver of a covenant by a party for whose benefit it is inserted into a written instrument, may be made by a parol agreement, and such waiver is held not to be a modification or change in the terms of the original agreement."

This simply means that where there are obligations on either party to a contract or on both parties to a contract, which the parties do not insist on being performed, and by their actions acquiesce in the elimination of such obligations, then such conduct is not a change in the contract or an addition to it, but simply a mutual arrangement which excuses or waives the performance of the contract. See also *Langley* v. *Devlin*, 95 Wash. 171, 163 Pac. 395.

We have heretofore discussed this testimony and we think there is no question but that the evidence here set out justified the Court of Appeals in stating: "Such acquiescence, we think, was shown by the evidence in the case at bar."

III.

The discussion of the question of the maxim that he who seeks equity must do equity and that he who seeks equity must come with clean hands, we think, is outside the question presented here. The matter was thoroughly briefed and thoroughly argued in the Court of Appeals, and it so clearly appears that there was no such unconscionable conduct on the part of the respondent as is required to invoke the two maxims. The whole conduct is embodied in the testimony of Herbert F. Morley and James Kelly, which has heretofore been referred to in this brief, and clearly shows no such conduct, and the Court of Appeals by the decision so found.

IV.

In Section IV on page 34 of petitioners' application and brief, it is stated that Exhibit "A," sought to be enforced, was not the real agreement between the parties. We have heretofore discussed these contracts in Section IX of responses to the reasons assigned by petitioners for the granting of the writ. It is only necessary to reiterate here that Exhibit "A" (R. 9), was the contract that was entered into between the parties, and was the contract which required the money to be deposited in the M. & T. Trust Company. Exhibit 3 (R. 73), was executed on the same day, solely for the purpose of making a joint direction to the depository, the M. & T. Trust Company, of the manner in which the account created under Exhibit "A," was to be disbursed and the substitution of a nominal depositor was not in anywise a modification or change in the contract.

V.

In Section V, page 35 of petitioners' argument, is again presented the question discussed in Sections II and III of respondent's reasons relied on for the allowance of the writ incorporated on pages 9 and 10 of respondent's application and brief. In the corresponding numbered section of respondent's response to the petitioners' reasons for the allowance of the certiorari, a sufficient answer to this argument is made. As there stated, there was involved no outstanding or conflicting interests. No rights of creditors had intervened and there was no question of the distribution as in bankruptcy or insolvency of the fund. The surety company was responsible for the debts and was seeking to apply the funds not to its own debt, but to the very debts of the very creditors who, if anyone, might have complained of this instrument, had it been an assignment. It clearly, however, was not an assignment nor any attempt to assign or enforce any rights against the United States Government by reason of purported assignment.

VI.

In Section VI on page 38 of petitioners' brief, is again raised the question in Section II on page 26 of the argument of petitioners' brief and previously discussed in paragraphs IV and V on pages 10 and 11 of petitioners' application in the discussion of the reasons relied on for the allowance of the writ. Further discussion of this question would appear to be unnecessary.

VII.

Section VII of petitioners' argument shown on page 39 of the brief, again discusses the questions set out in Sections II and III of the reasons relied on by petitioners

for allowance of the writ, and shown on pages 9 and 10, and again discussed in Section V on page 35 of petitioners' application. The cases in this section discussed were fully presented and discussed before the Court of Appeals, and an examination of them will disclose that they are in nowise applicable to the facts here. The respondent was merely attempting as heretofore stated to enforce a right which it not only had under the specific agreement with the Morley Construction Company to use these funds in the payment for labor and material, but also which it had as surety to be exonerated from its liability under the bond from any funds growing out of the contract. While the surety company was itself entitled to money which it advanced, that question was of no importance in the case as there were debts for labor and material in the performance of the contract which far exceeded the amount of the funds, together with all other available funds of the Morley Construction Company, and hence, there could be no application of the funds except for the purpose of paying the outstanding debts against the Morley Construction Company on this particular contract.

Conclusion.

It is, therefore, respectfully submitted that the petitioners have shown no reason for a review of this case by this Court, and have shown no facts or condition which would justify this Court in issuing the writ of certiorari prayed for.

Respectfully submitted,

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SPENCER F. HARRIS,
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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 325.

MORLEY CONSTRUCTION COMPANY, A CORPORATION, AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, A CORPORATION, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

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Town of Gastonia vs. Engineering Co., 131 N. C. 359, 42 S. E. 857.....20, 88

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 325.

MORLEY CONSTRUCTION COMPANY, A CORPORATION, AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, A CORPORATION, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

STATEMENT.

Petitioners' summary statement contained in the petition for certiorari is entirely inadequate and respondent here sets out such statement as will indicate the facts and matters involved.

This is an action brought by the Maryland Casualty Company, as surety upon the construction bond of petitioner, Morley Construction Company, to require the application of the sum of $59,780.82, being the last payment upon the contract, to assure which the bond was given, to the payment of the unpaid claims for labor and material performed and used in the completion of such work.

The Morley Construction Company is a corporation organized under the laws of the State of Missouri with a capital stock of $10,000.00 which represented its sole assets (Tr. 58).

On or about July 23rd, 1932, petitioner, Morley Construction Company, entered into a written contract with the Veterans Administration Department of the United States for the construction of a veterans hospital in or near the city of Batavia, New York, for the contract price of $540,300.00 (Tr. 2-16-86).

Under the requirements of the Heard Act then in force, petitioner, Morley Construction Company, furnished to the Veterans Administration Department a bond in the sum of $275,000.00, conditioned upon the completion of the said contract and the payment of all bills for labor and material entering into the construction of such work, and respondent, Maryland Casualty Company, signed such bond as surety (Tr. 66).

Petitioner, Morley Construction Company, entered upon the performance of said contract and continued in the performance thereof until on or about the 28th day of April, 1933, at which time a substantial portion of the contract had been completed. On or about this date,

the Morley Construction Company became involved in labor difficulties and also became involved in financial difficulties to such an extent that they were unable to proceed with the performance of such contract and in writing notified the Maryland Casualty Company that they were in such a financial condition that they could not proceed with the work without financial assistance from their surety, the respondent, Maryland Casualty Company (Tr. 64). At that time in response to such letter of notification a contract was entered into between the petitioner, Morley Construction Company, and respondent, Maryland Casualty Company, which provided for the deposit in a trust company in the City of Buffalo of the sum of $5,000.00 by the Maryland Casualty Company, and the sum of $5,000.00 by the Morley Construction Company, to be used in the completion of the contract. The contract further provides that the Morley Construction Company would from time to time deposit other sums of money in such account to be used toward the completion of said contract, and further agreed to deposit in such account for the benefit of the said contract all monies and estimates received from the United States Government because of such work (Tr. 62). In such contract the Maryland Casualty Company agreed to deposit in such account monies to pay off the unpaid plaster claims of the laborers of the plaster contractor, Giamberardino & Sons, and also sufficient money to complete the Giamberardino plastering contract if the amount to be paid to complete such contract was termed reasonable and satisfactory to the Maryland Casualty Company. The contract provided that the Maryland

Casualty Company should have joint control with the Morley Construction Company of all monies deposited in such account and that no check, draft or withdrawal order should be drawn on the account without the approval of the Maryland Casualty Company or its named representatives, to be designated by the initials of the representative or representatives of the Maryland Casualty Company upon any check, draft or other withdrawal order.

Coincident with the execution of such contract the Morley Construction Company deposited in such account $5000.00 which it borrowed from B. D. Morley, one of its officers, and this sum in addition to the $10,000.00 representing the original capital of the company was all of the money ever put into this contract by the petitioner, Morley Construction Company (Tr. 58).

Coincident with the execution of the contract the Maryland Casualty Company also deposited in such account the sum of $5,000.00, and thereafter deposited in such account the additional sum of $5700.00 to pay the unpaid labor claims of the employees of Giamberardino (Tr. 60). The Morley Construction Company did not from time to time thereafter deposit any further money in this account to be used toward the completion of the contract. The Maryland Casualty Company did not thereafter deposit in said account any further sums to be used for the completion of the Giamberardino plastering contract. The completion of the plastering contract was sublet to one Hudson, and the payments to him which were made, were made from estimates which the Government allowed on account of the plaster work thereafter

done by Hudson, which were deposited in this joint account (Tr. 81-91). Other payments were made from such account by the President of the Morley Construction Company at the suggestion of the representative of the Maryland Casualty Company (Tr. 81-91).

The work provided for in the contract was completed on or about November 9, 1933, and a settlement statement made which showed the unpaid amount of the contract price to be $59,780.82 (Tr. 19).

At this time or about this time, the Morley Construction prepared and furnished to the representative of appellee, Maryland Casualty Company, a list of the laborers and materialmen who had furnished labor and material entering into the performance of said contract, which showed a total amount of unpaid claims of $107,666.23 (Tr. 88). These did not include the item of $5,000.00 which the Morley Construction Company had borrowed from B. D. Morley, and did not include the sum of $10,700.00, which had been advanced under the contract of April 28, 1933, by the Maryland Casualty Company to the Morley Construction Company. This account also did not include an item of $3,000.00 representing the claim of the Ithaca Trust Company against the Morley Construction Company, and did not include the further claims then in existence, of Giamberardino, the plaster contractor, for damages for an alleged breach of contract by the Morley Construction Company (Tr. 61), and did not include the claim of one Moody L. Rupp, the grading contractor, the amounts of which were not then disclosed (Tr. 83). The amount of named indebtedness totals $126,366.23, not in-

cluding the above mentioned claims of Giamberardino and Moody L. Rupp.

The only assets which the Morley Construction Company had were represented by the sum of about $7,900.00 which then remained in the joint account in the M. & T. Trust Company in Buffalo, and the unpaid balance of the contract price of $59,780.82 (Tr. 19-74-86), totaling the sum of $66,780.82. In addition to this sum representing cash, the Morley Construction Company claimed an extra item against the United States Government of approximately $11[illegible]00 (Tr. 73). They also had a claim against one Moody L. Rupp, the grading contractor, for $19,919.11 for his alleged breach of his contract, which was unliquidated and which Rupp was denying, and against which Rupp was asserting a claim for damages, or for services, against appellant, Morley Construction Company, the amount of which was not then disclosed (Tr. 73). This claim was against Rupp and his bondsmen, the New Amsterdam Casualty Company. It also claimed to have a claim against the plaster contractor Giamberardino and his surety, the National Surety Company, in the amount of $20,689.29 for damages on account of the alleged breach by Giamberardino of his plastering contract (Tr. 73). This claim was unliquidated and denied by Giamberardino, and Giamberardino, in addition to his claim shown in the list furnished the Maryland Casualty Company by the Morley Construction Company, was asserting a claim for damages for the alleged breach on the part of the Morley Construction Company of its contract. The amount of this claim of Giamberardino was not at the time disclosed. The National Surety Com-

pany, the surety upon the bond of Giamberardino and against whom the claim was being asserted, was then out of business. The total of these claims added to the cash of $66,780.82 amounted to $108,519.22. Of this amount the sum of $41,738.40 claimed as assets by the Morley Construction Company, was represented by these unliquidated disputed claims against which were asserted liabilities against the Morley Construction Company by two creditors. The only available funds with which to pay the obligations of the Morley Construction Company on this job were the cash items represented by the deposit in the bank of $7,900.00 and the final check due from the Government of $59,780.82 (Tr. 74).

At the time of the execution of the contract of April 28, 1933, the Morley Construction Company, in compliance with that contract, and on April 28, 1933, notified the United States Veterans Administration Department to forward all future estimate checks to the Morley Construction Company in care of the Manufacturers & Traders Trust Company of Buffalo, New York, for the attention of E. W. Miller, the Vice-President (Tr. 65). Supplementing the contract of April 28, 1933, an additional contract was prepared and signed by the Morley Construction Company and the Maryland Casualty Company for delivery to the Manufacturers & Traders Trust Company of Buffalo, New York, which referred to the previous contract entered into between the Morley Construction Company and the Maryland Casualty Company, providing for the deposit of the funds in the Manufacturers & Traders Trust Company, which contract recited that all of the monies deposited and to be deposited

pursuant to said contract should be the joint property of the Morley Construction Company and the Maryland Casualty Company (Tr. 77). The work of the performance of this contract by Morley Construction Company was under the supervision of its President, H. F. Morley, who signed both of the contracts for the deposit of the funds in the M. & T. Trust Company. The work involved in this contract was substantially completed in July, 1933, and H. F. Morley, the President of the company, in September, 1933, left Batavia, where the work was being done, and went to his home in Kansas City, Missouri, where the main office of the Morley Construction Company was located (Tr. 79). Sometime prior to November 9, 1933, and after Mr. H. F. Morley had gone to Kansas City, Missouri, he, in the name of the Morley Construction Company wrote to the United States Veterans Department directing them to send the remaining balance of the contract price, when it became due, to the Morley Construction Company in Kansas City, Missouri (Tr. 86). He did not notify the Maryland Casualty Company of this attempted change from the provisions of the contract of April 28, 1933, and the Maryland Casualty Company had no knowledge of such direction or change (Tr. 86).

After the acceptance of the work by the Veterans Administration Department on or about November 9, 1933, the Veterans Administration Department caused the Treasurer of the United States to issue a warrant under date of November 13, 1933, payable to the Morley Construction Company and representing the balance of the contract price on such work. This warrant, the Veterans

Administration Department, under the direction of the Morley Construction Company, so given to it by H. F. Morley after his return to Kansas City, sent to the Morley Construction Company in Kansas City, Missouri. The check was received by H. F. Morley, the President of the Morley Construction Company, who carried it in his pocket until November 22, 1933. The Morley Construction Company did not notify the Maryland Casualty Company and the Maryland Casualty Company had no knowledge of the sending of this warrant by the Veterans Administration Department to the Morley Construction Company until on or about November 23, 1933 (Tr. 86).

On November 22, 1933, Herbert F. Morley, the President of Morley Construction Company, took this warrant to its bank, the Merchants Bank in Kansas City, Missouri, and with it arranged for the purchase of a cashier's check in the name of Herbert F. Morley, Trustee. The warrant was endorsed by the Morley Construction Company to the Merchants Bank and the Merchants Bank prepared a cashier's check for the amount of the warrant, payable to the order of H. F. Morley, Trustee. The Merchants Bank retained the cashier's check and forwarded the warrant of the Veterans Administration Bureau through the Federal Reserve Bank in Kansas City, Missouri, for collection (Tr. 89).

On November 23, 1933, the Maryland Casualty Company at Washington, D. C., learned that this warrant had been issued and sent to the Morley Construction Company, and learned that it had been transmitted to the Treasurer of the United States for payment (Tr. 91). The Maryland Casualty Company, through its representatives in

Kansas City, Missouri, at once got into contact with Herbert F. Morley and inquired of him if he had received this warrant and was informed that he had. They then requested and demanded of him that the warrant or the proceeds therefrom be sent to the Manufacturers & Traders Trust Company, as provided in the agreement of April 28, 1933, for the disbursement in payment of bills for labor and material performed and used in the construction of the veterans hospital, provided for by the contract between Morley Construction Company and the Veterans Administration Department (Tr. 101). Herbert F. Morley, the President of the Morley Construction Company, refused to comply with this request (Tr. 101). The Maryland Casualty Company then further tried to contact either Herbert F. Morley, the President of the Company, or B. D. Morley, its other active officer, and was unable to get in contact with them, for the purpose of trying to procure the sending of this money to the Manufacturers & Traders Trust Company (Tr. 102). The Morleys refused to answer a long distance telephone call from the representative of the Maryland Casualty Company with whom they had had contact during the performance of the work and refused to answer the telephone calls or to see the local representatives of the Maryland Casualty Company (Tr. 102). Thereupon, and on the 25th day of November, 1933, the Maryland Casualty Company filed in the Supreme Court of the District of Columbia, an action against the Morley Construction Company and against the Treasurer of the United States, asking for an injunction against the payment out of this money to the Morley Construction Company direct, upon which

complaint the said Supreme Court of the District of Columbia issued on the 27th day of November, 1933, its show cause order, addressed to the Treasurer of the United States, ordering him to show cause, if any, why he should not be enjoined pending the hearing of the case upon its merits, from paying the warrant so issued to the Morley Construction Company, and why a receiver should not be appointed to receive and disburse such money under the direction of that court (Tr. 95). Nothing further was done in that action and it was still pending, undisposed of, upon the hearing of this cause. The respondent, Maryland Casualty Company, at the trial of this cause and in open court, stated that upon entry of a judgment for the relief there prayed in its complaint, it would dismiss the proceedings then pending in the Supreme Court of the District of Columbia (Tr. 110-111).

On the 27th day of November, 1933, the respondent, Maryland Casualty Company, filed in the District Court of the United States for the Western Division of the Western District of Missouri its bill of complaint against the Morley Construction Company and the Merchants Bank of Kansas City, Missouri, being the petition upon which this cause was tried.

The petition (Tr. 1) was based upon and set out three separate grounds for relief, the first being based upon claim of right to a specific performance of the contract of April 28, 1933. The second was based upon an alleged right of subrogation against the funds representing the final payment to the extent of $10,700.00 alleged to have been advanced by the Maryland Casualty

Company for the payment of labor and material claims. And the third right asserted was that of exoneration. The petition set up the facts with reference to the contract and bond and set out the then existing indebtedness and the then existing assets and the liability of the Maryland Casualty Company for the outstanding bills and the insolvency of the Morley Construction Company, and prayed that the Morley Company be required to exonerate the Maryland Casualty Company by the application of this final payment to the bills for labor and material entering into the construction work.

The Morley Construction Company in answer (Tr. 14) to the bill of complaint filed its combined answer, motion to dismiss and counterclaim, in effect denying the right of the Maryland Casualty Company to a specific performance of the contract and denying the right of the Maryland Casualty Company to the subrogation and denying the right of exoneration as set up in the complaint. The counterclaim was based upon the suit filed in the Supreme Court of the District of Columbia alleging that by reason thereof, the Morley Construction Company was unable to pay its outstanding bills, resulting in a multiplicity of suits and a threat of additional suits, and asking as relief that the Maryland Casualty Company be directed to dismiss the suit in the District of Columbia and to cease or end the prosecution of the case at bar. The reply placed at issue all of the allegations of new matter set out in the answer and counterclaim.

The case was tried before the court. At the close of the plaintiff's evidence, the motion to dismiss was denied

by the court (Tr. 103). During the examination of defendants' first witness, it having appeared from the statements made that both plaintiff and defendant had in mind the application or use of the fund involved in the warrant for the balance of the contract price to the payment of labor and material bills, an inquiry was made to the parties as to the necessity for the suit. Counsel for defendants announced to the court in answer to an inquiry by the court as to whether or not the case could be terminated, that the defendants before the filing of the suit had offered to let the money be deposited in Kansas City in a joint account if the plaintiff would dismiss the suit, and stated that the plaintiff was unwilling to do so, and indicating that if such a thing was done the case might be determined. The court then inquired of counsel for plaintiff if such an arrangement would be satisfactory, and counsel for plaintiff in open court announced that from the beginning the plaintiff had agreed that if the money would be deposited in a joint account anywhere, applying it to the payment of claims for labor and material, it would be satisfactory to plaintiff, but that the defendant had been unwilling to do so, giving as a reason the damage suffered by the defendant by reason of the bringing of the suit. Counsel for defendant, in answer thereto, announced that plaintiff had only made the suggestion of depositing the money for the purpose of paying such bills for labor and material conditioned upon the giving by the defendant to the plaintiff of a release for any liability on account of the bringing of the suit upon which statement, plaintiff agreed in open court that if the defendant would place the money anywhere in

the United States under the joint control of the plaintiff and defendant for the payment of bills for labor and material, the plaintiff would dismiss the suit without any commitment or release by the defendant as to its future actions. Whereupon, the court stated the proposal, as he understood it, that the plaintiff would be willing to dismiss the suit if the money was deposited in a joint account to be disposed of under the joint control of the plaintiff and defendants, and that the plaintiff was willing to dismiss it without any restrictions of the right of the defendants to bring any suit they might want to bring, and stated that he did not see why the parties could not come to an agreement. A recess was taken for the purpose of disposing of the case by agreement, after which counsel for plaintiff announced to the court that they had not been able to agree because the defendants refused to permit the money to be deposited subject to joint control, and because defendants insisted that they be permitted to use the funds so deposited in the prosecution of the claims of defendants against defaulting contractors and claims of the defendants against the Government (Tr. 110-111-112). Whereupon, the trial of the case was continued to a conclusion. On October 2, 1934, the court decided the case, filing a memorandum of opinion of the court and the findings of fact and conclusions of law of the court, together with its opinion (Tr. 120-125). In the findings of fact, the court found that all of the monies, including the final payment, should be deposited in the Manufacturers & Traders Trust Company under the agreement of April 28, 1933, and found that the Maryland Casualty Company had not advanced the money to

pay the labor for the completion of the plasterer's contract, and upon this finding of fact in his conclusions of law held that the plaintiff was not entitled to a specific performance of the contract of April 28, 1933, because the Maryland Casualty Company had not fully complied with the contract on its part. In his findings of fact the court found that the $5,000.00 deposited by the plaintiff in the joint account under the agreement of April 28, 1933, and the $5700.00 thereafter deposited in such account, were advancements made by the plaintiff to the defendant and hence were not payments made direct for labor and material, and denied to the plaintiff the prayer for a subrogation to the extent of such advancements. The court in its findings of fact found that when the bill was filed, claims against the Morley Construction Company in favor of those who had furnished labor and material on the contract, which amounted to more than $100,000.00, had matured and were due and payable, and held that the plaintiff was entitled to exoneration by the defendant, and upon such findings of fact and conclusions of law entered the decree in the case ordering that the defendant, Morley Construction Company, exonerate and hold the Maryland Casualty Company harmless, and ordering that the Morley Construction Company promptly pay all labor and material claims arising on the hospital job and that they apply to such payment all monies it then had or which it might thereafter realize from the performance of the contract, including the sum of $59,780.82 represented by the United States Treasury warrant of November 13, 1933, and including the proceeds of any other warrant or warrants

which might be issued in the place of such warrant and including all other assets of the defendant, Morley Construction Company, which it then had or might thereafter acquire, in so far as the same might be necessary for the payment of labor and material claims incurred in the performance of the hospital contract, excepting only the proceeds which the Morley Construction Company might derive from the performance of any other contract which might be required for the payment of labor and material claims incurred in the performance of such other contracts, and ordered that the defendant, Morley Construction Company, deposit the proceeds from the United States Treasury warrant in some bank to be designated as a special trust fund for the payment of bills for labor and material used in the construction of the United States Veterans Hospital at Batavia, New York, and ordering that the cross bill of the defendants be dismissed.

From this order and judgment appeal was taken to the United States Circuit Court of Appeals for the Eighth Circuit.

The Circuit Court of Appeals, upon a hearing, affirmed the decision of the District Court, and by its decree remanded the cause to the District Court with directions to modify its decree in accordance with the views expressed by the United States Circuit Court of Appeals (page 126, Transcript) and adjudging that the decree so modified was by the court affirmed. In the opinion of the United States Circuit Court of Appeals (page 126, Transcript), the Court of Appeals discusses the question of exoneration and of specific performance, and indicates that as to the right of exoneration, the

suit was prematurely brought inasmuch as it was brought before the six months' period within which the Government was entitled to first have recourse under the bond, expired, and while not definitely deciding that question, stated in its opinion that the Court of Appeals preferred not to place the relief granted on the basis of exoneration but rather on the basis of specific performance of the agreement of April 28, 1933 (page 138, Transcript). With this expression in the opinion, the court entered the decree affirming the decision of the District Court as shown on page 138 of the Transcript of the Record. This opinion is reported in Vol. 84 F. (2) 527.

The decree of the United States Circuit Court of Appeals was rendered on June 26, 1936, and on July 7, 1936, petitioner filed its petition for a rehearing in the Circuit Court of Appeals, which was on July 20, 1936, denied. A motion for a stay of the issuance of the mandate was filed on July 30, 1936, and on August 3, 1936, on such motion a stay of 30 days was given in order to permit the filing of a petition for certiorari.

Such petition for a writ of certiorari was filed in this court, and on October 12, 1936, by its order made and entered, this court granted the petition for certiorari.

On the 24th day of November, 1936, respondent received from the clerk of this court, copies of the printed Transcript of the Record, since which time respondent has received no brief or further evidence of the prosecution of petitioner's certiorari.

POINTS AND LIST OF CASES.

I.

The Circuit Court of Appeals had the right to consider any point raised by the issues and to modify the decree of the District Court, even though its reasons for so doing were contrary to the ones given by the District Court.

The Maria Martin v. *Transportation Co.*, 12 Wall. 31, 20 L. Ed. 251.
Peoria & Pekin Railway Co. v. *United States, et al.*, 263 U. S. 528, 68 L. Ed. 427.
Bolles v. *Outing Co.*, 175 U. S. 262, 44 L. Ed. 156.
O'Neill v. *Wolcott Mining Co.*, 174 Fed. 527.
2 Rul. Case Law, Section 156, page 184.
2 Ruling Case Law, Section 155, page 182.
Cleary v. *Foundry Co.*, 132 U. S. 612.
Merchants & Manufacturers Securities Co. v. *Johnson*, 69 Fed. (2d) 940.
Blackhurst v. *Johnson*, 72 Fed. (2d) 644.
Alexander v. *Cosden Pipe Line Co.*, 290 U. S. 484, 74 L. Ed. 452.
United States v. *Express Co.*, 265 U. S. 425.
Bothwell v. *United States*, 254 U. S. 231, 39 A. L. R. 56.
Cherokee Nation v. *Black Feather*, 155 U. S. 218.
Swager v. *Smith*, 194 Fed. 762.
Lagnes v. *Green*, 282 U. S. 531.
Public Service Commission v. *Havemeyer*, 296 U. S. 506.
Stelos v. *Hosiery Co.*, 295 U. S. 237.
Commissioner of Internal Revenue v. *Kelly's Estate*, 84 Fed. (2d) 958.
Erwin v. *Lowry*, 48 U. S. 172.
Dean v. *Davis*, 212 Fed. 88.
Mound City v. *Castleman*, 187 Fed. 921.
Guarantee Company v. *Phoenix*, 124 Fed. 170.
Harding v. *Federal National Bank*, 31 Fed. 914.

II.

The respondent, under the facts and the law, was entitled to specific performance of the contract of April 28, 1933.

Becker v. *Becker*, 250 Ill. 117, 95 N. E. 70.
Shubert v. *Woodward*, 167 Fed. 47.
Michigan Pipe Co. v. *Fremont Ditch Co.*, 111 Fed. 284.
Fitzgerald & Remick v. *Britt*, 43 Iowa 498.
Work v. *Welsh*, 43 N. E. 719, 160 Ill. 468.
Van Dyke v. *Cole*, 70 Atl. 593, 81 Vt. 379.
City of LaFollette v. *LaFollette Water Co.*, 252 Fed. 762.
Taylor v. *Longworth*, 14 Peters 172.
Shaw v. *Livermore*, Volume II, Green's Reports (Iowa) 338.
Bell v. *Warren*, 39 Texas 106.
Morley Construction Co. v. *Maryland*, 84 Fed. (2d) 522.

III.

The copy of the contract, Defendant's Exhibit 3, did not supersede the contract of April 28, 1933, nor was such contract changed by changing the deposit account in the M. & T. Trust Company from Morley Construction Company to H. F. Morley.

IV.

The contract of April 28, 1933, did not constitute an assignment in violation of Section 203, Title 31, U.S.C.A.

V.

There was no substantial breach by respondent of the contract of April 28, 1933.

VI.

The respondent had the right to have the funds represented by the United States warrant of November 13,

1933, so impressed as to be made available for the payment of the labor and material bills under the contract.

VII.

Respondent was entitled to exoneration by petitioner out of the funds resulting from the construction work covered by the contract, for which respondent's bond was given.

21 Ruling Case Law, paragraph 146, pages 1110 and 1111.

Southwestern Surety Co. v. *Wells*, 217 Fed. 294.

Glades County v. *Detroit Fidelity Co.*, 57 Fed. (2d) 449.

U. S. F. & G. v. *Bank of Brewton*, 4 Fed. Supp. 272.

Prairie State Bank v. *United States*, 164 U. S. 227.

Pavarini v. *Title Guaranty & Surety Co.*, 36 App. Cas. (D. C.) 348, Ann. Cas. 1912C, 367.

West Huntsville Cotton Mills Co. v. *Alter*, 164 Ala. 305, 51 So. 338.

Ferer v. *Barrett*, 57 N. C. 455.

Thomas v. *St. Paul's M. E. Church*, 86 Ala. 138.

Hutchinson v. *Brand*, 79 Kans. 340, 99 Pac. 592.

Roberts v. *American Bonding Co.*, 83 Ill. App. 463.

Pratt Lumber Co. v. *Gill*, 278 Fed. 783.

Town of Gastonia v. *Engineering Co.*, 131 N. C. 359, 42 S. E. 857.

Stulz-Sickles Co. v. *Fredburn Corp.*, 169 Atl. 27, 114 N. J. Eq. 475.

Greenberg v. *Leff*, 146 Atl. 196, 104 N. J. Eq. 502.

Bishop v. *Day*, 13 Vt. 81, 31 Am. Dec. 582.

Holcombe v. *Fetter*, 70 N. J. Eq. 300, 67 Atl. 1078.

Dobie v. *F. & C. of N. Y.*, 70 N. W. 482, 95 Wisc. 540.

Wells v. *City of Philadelphia*, 270 Pac. 42, 112 Atl. 867.

ARGUMENT.

I.

The Circuit Court of Appeals has the right to consider any points raised by the issues and to modify the decree of the District Court, even though its reasons for so doing were contrary to the reasons given by the District Court.

Petitioner, in its brief accompanying its petition for the Writ of Certiorari, gives as its main reason for a review by this court that the Circuit Court of Appeals, in modifying the decision of the District Court denying specific performance, was acting without authority under the law applicable to the case and to the issues set up, because respondent was defeated in the trial court by the denial of the prayer for specific performance and, as it did not appeal from the decision and decree of the trial court, the Court of Appeals had no jurisdiction or authority to modify the decree so as to grant the relief under the plea for specific performance. In support of this statement, petitioner refers to a number of cases set out in its brief, beginning on page 22.

We may, in the inception of the argument concede that the general rule, and particularly in cases at law, is that an appellee cannot complain of an adverse ruling in the lower court, without taking a cross appeal in the case. And that is the effect of the cases cited by petitioner. This general statement of the law, however, does not prevent the appellee from raising any point on the appeal which tends to uphold the decree, and this general

rule is not applicable to a review of a case in equity where the appellate court has the right to review the whole case on the facts and the law and to arrive at what it conceives to be a just decision upon the law and the facts, even though in such review in its reasons for the decision given it does not agree with the reasons given by the lower court for its decree.

This is a suit in equity in which the respondent is seeking relief to which it is unquestionably entitled. It had, and has, but one purpose, and that is to see that the proceeds from the contract, the completion and payment for which respondent executed its bond as surety, were applied to the payment of bills for labor and material used in the completion of the contract. It gave as its reasons in the Bill of Complaint (page 1, Transcript):

Three grounds, upon any of which, or upon all of which, as the court might see fit, the court might have held that the money representing the unpaid purchase price should be applied in liquidation of the labor and material bills, were set out in the complaint. So far as respondent was concerned, it did not matter for what reason the relief was given, if the relief was actually given. So far as respondent was concerned, and so far as the District Court was concerned, it would not have been necessary for the court to have given any reason for its decree, and the court might well have simply entered its decree granting to the respondent the relief it sought; in which event, unquestionably, on appeal the appellate court without reasons for affirmance could have simply affirmed the judgment, which would have given to respondent, finally, the relief it was seeking. The

fact that the court in an equitable proceeding gave the wrong reason, if it did, while rendering the correct relief or judgment, would not make such determination invalid. This has been determined so often in equity cases that there should be little room for argument.

Respondent has cited and quoted from a number of cases, but an examination of them will indicate that in most instances they were actions at law, and in each instance it can be shown that the decisions were not applicable to the exception to the general rule hereinbefore referred to.

The case of *The Maria Martin* v. *Trans. Co.*, 12 Wall. 31, 20 L. Ed. 251, cited on page 22, petitioner's brief, was a libel action filed by the owners of the ship Cleveland against The Maria Martin for damages on account of a collision. The District Court dismissed the libel action and libellant appealed to the Circuit Court of Appeals. On appeal the Circuit Court of Appeals held that both parties were in fault and reversed the District Court and entered a decree that each party should pay a portion of the damages and each its own costs. The Bark Maria Martin appealed from the decision of the Circuit Court of Appeals and the libellant did not appeal. The Supreme Court simply held that as libellants had not appealed from the decree of the Circuit Court of Appeals on the holding of negligence, the holding was conclusive as to them. Apparently, libellants were seeking to reverse the decree which established their negligence and thus were seeking to overdraw, not to sustain the decree of the

Circuit Court of Appeals. The court in its opinion in the portions cited by petitioner states:

> "But where only one party appeals, the other is bound by the *decree* in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, *except in support of the decree* from which the appeal of the other party is taken" (italics ours).

In the case of *Peoria & Pekin Railway* v. *United States, et al.*, 263 U. S. 528, 68 L. Ed. 427, the Interstate Commerce Commission had ordered the Peoria Railway Company to exchange traffic with the Minneapolis & St. Louis Railway Company. The Peoria Company, taking the position that the Interstate Commerce Commission was without authority to enter such an order, brought an action in the District Court to enjoin the enforcement of the order. A mandatory injunction was denied and the Peoria Company took a direct appeal to the United States Supreme Court, where contention was made by the Peoria Company that such an order could not be made without notice and full hearing, and no notice or hearing had been given or had, prior to entering the order. In the Supreme Court the Interstate Commerce Commission contended that as the residence of the Minneapolis Railway Company was in the State of Iowa, the proper venue was in the District Court of Iowa. In the District Court the Peoria Railway Company had raised this point as an objection to the right of the Interstate Commerce Commission to enter the order without notice or hearing.

The court ruled that as the venue provision was for the benefit of the Minneapolis Railway Company it could

be waived by the railway company. An objection was made in the trial court to the introduction of evidence on this question, which was sustained and the court held as no appeal was taken from this ruling the question could not be raised on appeal.

The case of *Bolles* v. *Outing Co.*, 175 U. S. 262, 44 L. Ed. 156, cited on page 23 of petitioner's brief, was an action brought by Bolles for the infringement of a copyright. In the trial in the District Court the bill was dismissed on the ground that the copyright stamp used was insufficient notice of the copyright. Bolles sued out a writ of error to the Circuit Court of Appeals, which court held that the stamp was sufficient, and for that reason the bill should have been dismissed, but sustained the trial court in the exclusion of certain evidence which was offered and the case was sent back for a new trial. In the new trial, the trial court refused to permit certain evidence offered by the plaintiff as to the number of the copies of the publication which had been found in defendant's possession at any time prior to the commencement of the action. It was shown that one magazine carrying the copyrighted article was purchased by an employee of the defendant. The court allowed a judgment of $1.00, for the one publication shown in evidence, being the statutory penalty for each sheet containing the copyrighted article. The plaintiff appealed to the Circuit Court of Appeals where the decision of the lower court was affirmed. The plaintiff brought the case to the Supreme Court and the defendant did not appeal from the judgment for nominal damages. There were

two other defenses interposed in addition to that on which the court rendered its decision, which, if sustained, would have prohibited the allowance of even nominal damages. The defendant sought to invoke these defenses, not in support of the decree rendered, but for the purpose of procuring an adjudication that the plaintiff was not entitled even to nominal damages, and this court held that as the defendant did not sue out a writ of error, he could not be heard to complain of any adverse rulings of the court below. Defendant was seeking not to uphold or support the decree, but was seeking to procure another decree than that entered. This, also, was a law action.

In *O'Neil* v. *Wolcott Mining Co.*, 174 Fed. 527, (8th Circuit), cited on page 24 of petitioner's brief, the Wolcott Mining Company received from a mutual agent for a seller and a buyer a certificate of stock properly endorsed and requested the mining company to transfer it to the buyer. The mining company delivered the certificate and assignment to the agent without the knowledge or consent of the buyer who had paid $2000 for it.

The buyer brought a suit to compel the transfer of stock and the trial court dismissed the Bill of Complaint. In answer, the defendants set up that four other named persons were necessary parties to the action and who were not named as parties.

The complainant appealed from the decision of the District Court to the Circuit Court of Appeals. There, the defendants sought to raise the point that the decree of dismissal should be affirmed because these named parties were not made parties to the original action.

The court held (l. c. 535), that if the parties alleged to be necessary parties were necessary parties, that fact would reverse, not sustain, defendants' decree below, and that having taken no appeal, the defendants could not be heard in the Supreme Court to urge any error which would set aside the result in their favor; that they could present only contentions which would support the decree, and that if appellee took no appeal, he could not raise a point in the appellate court to review decisions against him in the court below, "much less can he be heard to challenge rulings too favorable to him."

On page 24 of petitioner's brief is cited 2 Ruling Case Law, Section 156, and it is stated that this work cites *O'Neil* v. *Wolcott Mining Co., supra*, as the original leading case in support of the text quoted as:

> "* * * A party who has not appealed cannot ask of an appellate court a judgment more favorable to himself than the one he obtained in the court below."

We do not find this case cited in support of or under paragraph 156 in 2 Ruling Case Law, but we do find it cited in support of Section 155, where it is stated:

> "As a general rule, the appellee or defendant in error who has not appealed or sued out a writ of error cannot assign error, the right to assign errors being restricted to the appellant or plaintiff in error."

On page 25 of petitioner's brief is set out a sentence quoted from 2 R. C. L., page 182. This section is correctly quoted so far as it goes, but petitioner neglects to add the first four words of the sentence, which are:

"As a general rule." Adding these words, the sentence reads as we have heretofore quoted it from Section 155 in 2 Ruling Case Law.

In the case of *Cleary* v. *Foundry Co.*, 132 U. S. 612, cited by petitioner on page 25 of its brief, a suit had been brought by Cleary to recover from the defendant the amount of an insurance policy alleged to have been received by the defendant. This was a law action. The defendant denied that it had received such proceeds and plead the statute of limitations. At the close of the evidence the plaintiff asked for certain instructions, which were refused by the court which, apparently, asked the court to direct the jury to find the plaintiff entitled to all of the proceeds of the insurance policy. The court held that the plaintiff was only entitled to recover what would have been the cash surrender value of the policies at the time of the bankruptcy, and instructed the jury to return a verdict for $1200, which was the agreed amount of the cash surrender value. The plaintiff appealed and the defendant did not. There is nothing in the record to indicate that the defendant raised any point on appeal, but this court, in the decision, commented on the fact that the court was wrong in giving the peremptory instruction and also commented on the fact that the limitation period had passed, but stated that the defendant had not appealed from the decision. This case does not reach the question involved here.

In the case of *Merchants S. Co.* v. *Johnson*, 69 Fed. (2d) 940, cited on page 25 of petitioner's brief, the Mer-

chants Company filed a claim against Johnson, who was the receiver of the Atlantic & Pacific Oil Company in a receivership proceeding, claiming that certain amounts collected by the oil company were proceeds from accounts which were owned by the Merchants Company and were trust funds to which the Merchants Company was entitled. This was an action at law. The defense was made that the accounts were usurious, and that the Merchants Company was a foreign corporation which had not procured a license to do business in Missouri and hence not entitled to maintain the action. The District Court allowed the claim as a general claim, but denied the right to enforce the assignments and held the contract usurious. The Merchants Company only appealed. There were but two questions presented in the lower court—that of usury and the disqualification of the defendant by reason of having no license in the State of Missouri. The defendant took no appeal. The court having found against defendant on the claim that the plaintiff had no license to do business in the State of Missouri, and in defendant's favor on the ground of usury, the defendant sought to raise in the Court of Appeals the question of the lack of license of the plaintiff, not to overthrow, but to sustain the judgment which was against the defendant. The Court of Appeals refused to consider this contention as the defendant had not appealed from the finding which was against him. The Circuit Court of Appeals commented on the fact that this case presented a strange anomaly in that the appellant was trying to upset a judgment which was in his favor and the appellee was trying to sustain a judgment which was against him.

The case of *Blackhurst* v. *Johnson*, 72 Fed. (2d) 644, cited on page 25 of petitioner's brief, was a petition in equity to set aside a trust created, apparently by a deed, as being against the rule against perpetuities. There was a decree for the defendants which, on appeal taken by the complainant, was reversed. On the appeal, the guardian *ad litem* for one infant grandchild attempted to raise the issue in the Court of Appeals that the deed in trust was testamentary in character and not being executed according to the laws of Missouri was void. This party did not appeal and the court held where no appeal was taken the guardian *ad litem* could be heard only in support of a decree, and not against it. This case is not in point.

The case of *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 74 L. Ed. 452, was an action brought by Cosden Company to recover certain excise taxes on crude oil alleged to have been illegally exacted by Alexander, Collector of Internal Revenue. The petition sets out four different claims based upon shipments during certain periods of time. It is a law case and a jury was waived and the District Court found for the plaintiff for the full amount of the first claim and the second claim. The third claim the District Court reduced from $36,666.50, the amount claimed, to $18,333.25, and reduced the fourth claim of $995.90, the amount claimed, to $746.92. The defendant, Alexander, the collector, only appealed to the Circuit Court of Appeals. The Circuit Court of Appeals sustained the District Court on the full amounts of the first and second claims, but reversed the District Court

as to the third claim and rejected it entirely and reduced the amount of the fourth claim of $746.92, allowed by the District Court, to the amount of $375.71. The Cosden Company, the plaintiff, thereupon voluntarily remitted the whole of the third claim and the sum of $375.71, the amount disallowed by the Court of Appeals on the fourth claim. The defendant Alexander filed his Petition for Certiorari in this court, which was allowed. The plaintiff did not file a Petition for Certiorari. It was here held that the plaintiff, the Cosden Company, not having appealed, was not entitled to be heard in opposition to the action of the decision of the Circuit Court of Appeals, in opposition to its finding, but could only be heard on matters urged in support thereof; that the plaintiff had consented to the disallowance of claim three and to the reduction of claim four and hence was not entitled to question the action of the Circuit Court of Appeals in regard to the matters which it had approved. This case is not contrary to the doctrine here contended for by the respondent.

In the case of *United States* v. *American Express Co.*, 265 U. S. 425, the American Express Company brought a suit to enjoin the Interstate Commerce Commission from enjoining an order establishing a through route to be used by the American Express Company. The real question presented for determination was whether or not the American Express Company was a "carrier by railroad" under the meaning of the Transportation Act of 1920. The Express Company, the complainant, in addition to its contention that the order was void because the

Act did not include the Express Company within the meaning "Carrier by Railroad," also contended that the order exceeded the powers of the Commission because unreasonable and because, for other reasons there given, the order of the Commission was not good. The trial court held that the American Express Company was not a "carrier by railroad" and granted the injunction. The Interstate Commerce Commission took an appeal to this court. The Southeastern Railroad Company, at whose request, apparently, the order establishing the through route was made by the Interstate Commerce Commission, was a party to the proceeding. In the hearing in this court, apparently, the American Express Company raised the question of the impropriety of the order on account of its being unreasonable, as well as the ground that the Express Company was not a "carrier by railroad."

The District Court apparently overruled the contention of the American Express Company that the order given was without authority because it exceeded the powers of the Commission and because it was unreasonable. The American Express Company took no appeal, but sought to again press these reasons in this court. The court, commenting on the situation, says, l. c. 235:

> "The Southeastern insists that these claims, although adequately presented in the Bill of Complaint, cannot be availed of in this court because they were overruled by the District Court and the American did not take a cross appeal. This objection is not sound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in

opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or in lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree to correct a matter not dealt with below. But it is likewise settled that appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court, or to an insistence upon matters overlooked by it."

This case, instead of being contrary to, supports the right of the Court of Appeals to affirm the decision in the instant case for reasons other than given by the District Court.

The case of *Bothwell* v. *United States*, 254 U. S. 231, 39 A. L. R. 56, cited by petitioner on page 24 of its brief, is a case in which the land of the plaintiff had been taken by the United States in a condemnation proceeding. In the condemnation proceeding the owner had filed a claim for the difference in value between the land before and after the conditions resulting from the reclamation proceeding, and also filed a claim for damages for the destruction of certain hay caused by floods growing out of the condition resulting from the condemnation proceeding, and also for damages occasioned to him by being required to sell cattle at a loss which were on the land at the time the flood conditions arose. The District Court allowed the difference in the value of the land, but denied the claimant his claim for the loss of hay

and for the loss in the value of the cattle. No appeal was taken by either side. A separate suit was then filed to recover from the Government the value of the items, a claim for which had been denied in the condemnation proceeding. The only thing held in this case was that no appeal having been taken in the other proceeding, the judgment there was a final one which could not be attacked in the instant case. This case is not authority for the contention of the petitioner.

On page 24 of the brief the petitioner cites the case of *Cherokee Nation* v. *Black Feather*, 155 U. S. 218. We do not find such a case, where cited, but in that volume on page 218 is reported such a case. This was an action brought, apparently at law, by the Shawnee Indians to enforce a claim for an equal interest in the Cherokee Indian Reservation. Apparently, an allowance was made per capita to each of the Shawnee Indians and the case was brought here on the appeal of the Cherokee Nation. In this court, apparently, the Shawnee Indians made application in which they asked for the decree to be modified increasing the amount per capita allowed. It was simply held in the case that the Shawnee Indians could not be heard to question the correctness of the amount allowed to them, as they had not appealed. This case is not in point.

Petitioner, on page 24 of its brief cites the case of *Swager* v. *Smith*, 194 Fed. 762. This case involves a bankruptcy proceeding in which a vendor of a hotel property had sold it and had taken back a deed of trust as

a part of the purchase price, which covered a moving stock of liquors, etc. He filed his note and deed of trust as a secured claim. The referee in bankruptcy, before whom the claim was filed, held that the deed of trust was void under the West Virginia law as covering movable stock, and allowed the claim only as a common or unsecured claim. The holder of the note and deed of trust appealed to the District Court, which sustained the ruling of the referee. The holder of the note thereupon took an appeal to the Circuit Court of Appeals. In the Circuit Court of Appeals the appellee, not having appealed, in his brief asserted the illegality not only of the deed of trust, but also of the whole contract, and sought not to have the decree of the District Court affirmed as given, but sought to have the whole claim denied even as a common claim. The court simply held that as the appellee had taken no cross appeal, he could not raise the question which permitted him to change the decree of the District Court by entirely eliminating the claim of the claimant as a common creditor. The Circuit Court of Appeals affirmed the decision of the lower court. So far as the record shows, the question of the illegality of the claim as a common creditor was never asserted in the lower court, and the only question there raised was as to the validity of the deed of trust. This case is clearly within the general rule and is not authority against the position of the respondent here.

This court and the Court of Appeals in recent and applicable decisions have unquestionably held that in an equity proceeding the appellate court may consider law and all the facts in the lower court and may give such

decision as is deemed just, and unquestionably hold that the Circuit Court of Appeals had the right, as it did in the instant case, to grant the relief prayed for, even though, in its judgment, the relief should have been granted for other reasons than those given by the District Court.

Perhaps one of the clearest cases is that of *Lagnes* v. *Green,* 282 U. S. 531. In this case Green, on October 11, 1927, brought an action in the state court against Lagnes, the owner of the vessel Aloha to recover $25,000 damages for personal injuries alleged to have been suffered by him while employed on the ship.

Section 4383, Revised Statutes (U.S.C.A., Title 46, Section 83) limited the liability of a ship owner in certain named instances to the value of his vessel. In this case it was stipulated that the vessel Aloha was of no greater value than $5000.

Just two days before the state case was set for trial, Lagnes, the owner of the vessel, filed a proceeding in the Federal District Court, asking to have his limit of liability for his damages adjudicated under this section. The Federal District Court issued an order restraining the proceedings in the state court and issued an order to all claimants against Lagnes to present their claims in that action within a fixed time. Green, in response to the order, filed his claim for $25,000 for personal injuries, and no other claims were filed. Green then moved to dismiss the restraining order on the claim that the state court had jurisdiction of the cause; that

there was only one possible claimant and one owner, and that Lagnes might set up his claim of limitation of liability in the state court. This motion was denied and apparently no further action taken regarding such ruling.

The District Court then proceeded to try Green's claim, deciding it would first inquire whether there was any liability, and that then, upon such hearing, if a liability was established, the court would take up the question as to whether it should be limited. Upon the conclusion of Green's testimony, the District Court held there was no liability, and, without deciding upon whether or not the limitation section could be enforced in the state court, entered a decree that there was no liability of Lagnes to Green. From this decision Green appealed.

In the Circuit Court of Appeals Green assailed the judgment of the District Court on two grounds. First, there being but one possible claim and but one owner, that Lagnes should have sought his remedy by pleading in the state court the contention which the District Court had not passed upon.

And second, that the record disclosed privity and knowledge of the owner with respect to Green's injury, which took the case without the provisions of Section 4383.

The Circuit Court of Appeals reversed the decree of the District Court and remanded the case to the District Court with directions to dismiss the case for want of jurisdiction, and in such decree, or in the opinion supporting the decree, rejected the first ground of Green's contention, that the state court had jurisdiction, and sustained the second contention made by Green, that inas-

much as the evidence showed privity and knowledge of Lagnes, Section 4383 did not apply, and, consequently, the District Court was without jurisdiction of the cause.

Green brought the case to this court and this court held that the Court of Appeals was wrong in its holding that the second ground of Green's complaint, that the Federal Court did not have jurisdiction because of the privity and knowledge of the owners shown, did not present a jurisdictional question, and held that the District Court had jurisdiction to pass on Green's claim and that its determination either way was a determination of that question. This court then declined to further consider the second ground upon which Green assailed the District Court's finding, because this court held that its conclusion upon the first ground—that is, as to whether or not the state court had jurisdiction to try out the question of liability —was that both the District Court and the Circuit Court of Appeals were in error. The petition for certiorari to this court was filed by Lagnes, and he contended that since Green had not applied for certiorari, and since the decision of the Circuit Court of Appeals was against him on point 1—that is, the question of the state court's jurisdiction to apply the limitations statute, had been decided against Green by the Circuit Court of Appeals, this propriety of the action of the Court of Appeals on point 1 was not open for consideration before this court. This court held that this contention was without merit and held, notwithstanding that Green filed no petition for certiorari, that the District Court was wrong in not dissolving the restraining order and permitting Green to pursue his action in the state court, and was also

wrong in the hearing and determining of the personal injury action.

This court also held that the Circuit Court of Appeals was wrong in overruling the contention of Green that he should be permitted to pursue his case in the state court and wrong in dismissing the case because it was shown that Lagnes had privity and knowledge of Green's injury, and held that Green could pursue his state court remedy, but that the action in the Federal Court should not be dismissed, and should be kept alive, awaiting a determination of the state court for such action as might thereafter become necessary. In this case this court made its own decision considering the contentions of Green and passing upon them, although he had not applied for a certiorari.

In the case of *Public Service Commission of Puerto Rico* v. *Havemeyer,* 296 U. S. 506, the case arose over an order made by the Public Service Commission of Puerto Rico. A franchise had been issued by the Public Service Commission to an applicant, which had been assigned to Russell & Company. An application was made by certain owners of property in a basin served under the irrigation franchise for a revocation of the franchise, for the reason that Russell & Company had not complied with the terms of the franchise with respect to maintaining the level in the water reservoir, as a result of which their lands had been overflowed and damaged. On this application the Public Service Commission cancelled the franchise. Russell & Company took an appeal to the District Court of San Juan, which court sustained the

action of the Commission and cancelled the franchise. The District Court, however, in its judgment deemed that it was only required to decide whether or not the order was reasonable and, upon hearing, found that the order was reasonable and dismissed the appeal from the order of the Public Service Commission.

Russell & Company, by proper appeal, took the case to the Supreme Court, which, passing only on the question of the reasonableness of the order, affirmed the judgment of the District Court of San Juan, holding the Commission's order reasonable.

Russell & Company then took an appeal to the United States Circuit Court of Appeals for the First District and the Circuit Court of Appeals, finding that the order was unreasonable, reversed the decision of the Supreme Court. Thereupon, the Public Service Commission filed its petition for a writ of certiorari to this court, which was granted. Apparently, no question of the jurisdiction of the Public Service Commission to make the order had been raised up to the time of the granting of the writ of certiorari, and Russell & Company did not apply for a writ of certiorari to this court, having received the relief they sought. To support their position Russell & Company apparently asserted in this court, not only that the order was unreasonable, but also asserted that, although they had not questioned or objected to the judgment of the Circuit Court of Appeals, which was in their favor, here, for the first time, asserted that the decision of the Circuit Court of Appeals was correct, not only for the reason that the order was unreasonable, but also contended that even if the order was reasonable, the

Public Service Commission was without authority to cancel the franchise. Russell & Company, without having asked for a certiorari, were raising in this court for the first time a reason in support of the judgment of the Circuit Court of Appeals which had not theretofore been raised. This court said, l. c. 509:

> "Notwithstanding the absence of a cross petition, we may consider respondent's insistence that the Commission was without authority to make the order."

In the case of *Stelos* v. *Hosiery Co.*, 295 U. S. 237, an action was brought by the Stelos Company against the Hosiery Corporation for the infringement of a patent. In defense, by way of answer, defendant claimed that the patent was invalid by reason of the failure of the plaintiff to make proper disclosure of the invention and invalid by reason of anticipation and also denied that there was an infringement. The District Court found for the defendant for the reason that there was no infringement of the patent and apparently did not give the invalidity of the patent as a reason for finding for defendants.

On plaintiff's appeal, the Court of Appeals held that by reason of the narrow construction of the claim in the patent and of the prior art, there was not sufficient to exclude the method charged as an infringement, and affirmed the decree of the District Court, and apparently, or inferentially at least, found against the defendant on the question of the invalidity of the patent.

Complainant then filed a Petition for Certiorari to this court to review the action of the Court of Appeals

in holding that there was no infringement. The defendant, respondent, did not apply for a cross Petition for Certiorari. Although the defendant did not in this court urge, as an additional reason for sustaining the decision of the Circuit Court of Appeals, that the patent was invalid, this court said at l. c. 238-239:

> "In support of the judgment, the defendants might have urged the point as to the invalidity decided against them in the Circuit Court of Appeals without applying for cross Writ of Certiorari."

The case of *Commissioner of Internal Revenue* v. *Kelly's Estate*, 84 Fed. (2d) 958, decided by the Seventh Circuit Court of Appeals, which cites and follows the case of *Lagnes* v. *Green, supra,* perhaps most clearly sets out the doctrine enunciated by the cases just referred to. In that case a report had been made by the executor of the Kelly estate for inheritance tax purposes, in which he had listed as an asset a certain property known as the Roseland property of the value of $250,000, and in the same report he had taken as a deduction two notes, one for $24,000 and one for $150,000. The Commissioner of Internal Revenue denied the claim of the executor for deductions on account of the $24,000 note and the $150,000 note and assessed an estate tax of $3783.16.

The executor filed his petition for review before the Board of Tax Appeals and there was permitted by the Board of Tax Appeals to amend his original petition by alleging that, instead of the deceased owning a fee title to the Roseland property, which was listed as an asset, the decedent owned only a life estate which terminated

with his death, and hence could not be considered as an asset in assessing the estate tax. With this amendment, the Board of Tax Appeals held that the title of the deceased was only a life estate and not subject to an estate tax and that taking it from the list of assets presented an estate in which there was no tax deficiency.

The Internal Revenue Commissioner filed the usual necessary application in the Seventh Circuit Court of Appeals for a review of the decision of the Board of Tax Appeals on the question of title to the real estate. Before the Board of Tax Appeals apparently the question of the claim for deductions of $24,000 and $150,000 was not considered. The executor filed no application for an appeal from the finding of the Court of Tax Appeals, for although the finding had been against him on the question of the deduction of the $24,000 and the $150,000 items, the net result was a finding in his favor.

In the Circuit Court of Appeals, although he had taken no appeal, the executor contended that even if it should be determined that the ownership of the Roseland property was in fee and, consequently, that the property should be considered subject to the estate tax, such item should be offset by the deductions which the executor claimed and which the Commissioner should have allowed, but did not. Touching this question, the court says, l. c. 962:

> "In his brief the respondent contends that even though it should be determined that the Roseland property belonged to decedent in fee simple at the time of her death, and that it must, therefore, be included as a part of her gross estate, nevertheless

the decision of the Board that 'there was no deficiency in the estate tax' must be affirmed. This contention is based upon the theory that the Board erred in denying the deductions for the $24,000.00 and the $150,000.00 indebtednesses to which he contends in the brief the estate is entitled, and when these debts are deducted from the gross estate the decision of the Board is correct, even though the value of the Roseland property is included therein. These are the two items of indebtedness to which reference has heretofore been made deduction of which was denied by the Commissioner in his determination of the deficiency tax, in which determination he was sustained by the Board. No cross petition for the review of the adverse ruling of the Board upon these two propositions was filed by the respondent in this proceeding. His position is that no such petition is necessary to present the question of whether such debts should be deducted, in the event of adverse decision by this court upon the question of title to the Roseland property presented by petitioner in his petition for review. The Board's decision was that 'there is no deficiency in the estate tax;' therefore, respondent says he has the right to ask this court to review the action of the Board with respect to its disallowance of the deductions in an effort to sustain its final decision. This, he contends, is the duty of the court, whether presented by cross petition or not. It seems that respondent finds support for his position in the case of *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555, 51 S. Ct. 248-249, 97 L. Ed. 544, wherein the court said: 'Respondents seek to sustain this judgment upon that ground, and also upon the additional ground, which the lower court found against them, that there was no evidence of a conspiracy or combination to monopolize interstate trade. Because there was no cross petition for certiorari, petitioner insists that the additional ground is not open here for consideration. But respondents do not invoke that ground in order to overthrow the

judgment below, but to sustain it; and this they may do. *Lagnes* v. *Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520.'

It is extremely doubtful whether respondent had the right to file a cross petition in this proceeding, because he received, by virtue of the Board's decision all of the relief for which he asked; that is, there was no deficiency in the estate tax of decedent. He was not aggrieved by such decision, and, therefore, there was nothing upon which to ask a review. The Supreme Court, in the case of *Corning, et al.* v. *Troy Iron & Nail Factory*, 15 How. (56 U. S.), 451, 465, 14 L. Ed. 768, said: 'The court were not bound to give any reasons for their decree. The law gives the party aggrieved an appeal from a final decision of an inferior court. But it does not give the party who is not aggrieved an appeal from a decree in his favor because the judge has given no reason, or recited insufficient ones for a judgment.'"

See *Guarantee Co. of North America* v. *Phoenix Ins. Co.*, 124 F. 170 (C.C.A. 8); *Harding* v. *Federal National Bank* (C.C.A.) 31 F 914.

"In deciding whether or not there is a deficiency in decedent's estate tax, the Board of Tax Appeals had several questions to determine. It required a determination of each of these questions before it could arrive at its final conclusion, and each question was considered separately by it, as shown by its written opinion. After each question had been considered and determined, it then arrived at its final decision, based upon its answer to each of the questions presented, that there was no deficiency tax due. From this final decision and from this alone, the Commissioner filed his petitioner for a review of this court. True, the errors assigned relate wholly to the question of the title to the Roseland property; that is, whether the decedent was owner thereof in fee simple, or whether she was the owner of only a life estate therein. This court having decided that ques-

> tion in favor of the petitioner, the question yet remains whether or not the Board erred in its final decision that there is not tax due. That question can only be determined by a consideration of the correctness of the Board's ruling that the respondent is entitled to no deduction for the two items of indebtedness heretofore mentioned."

In the case of *Erwin* v. *Lowry*, 48 U. S. 172, the court states the doctrine as follows:

> "This court must affirm the judgment of the trial court if it finds in the record any reason which it considers sound enough, even though the District Judge may have rejected that reason and rested his decree on some other ground."

This case is cited with approval in the case of *Dean* v. *Davis*, 212 Fed. 88, l. c. 89, where the quotation just cited is adopted and set out in the opinion of the court.

In the case of *Mound City* v. *Castleman*, 187 Fed. 921, l. c. 923, Judge Walter Sanborn of the Circuit Court of Appeals for the Eighth Circuit, states the principle thus:

> "The proceedings in this suit have been many and tedious. An original bill, two supplemental bills of pleas, answers, exceptions to answers and numerous rulings in the progress of the case have presented numerous favorable opportunities for alleged errors, which counsel for appellant has not failed in his assignments to specify and take every possible advantage of, but an appeal in a suit in equity invokes a trial of the case *de novo* by the appellate court and demands, where that is possible, a just and final decision. When, therefore, the record clearly shows that the decision below was right and that alleged errors, if they existed, could not affect adversely to the appellant to the final result, the decree must be affirmed."

II.

Respondent Was Entitled to Specific Performance.

The district judge granted the relief prayed for in respondent's petition on the one ground of exoneration. He could and should have granted it also on the ground that respondent was entitled to have the contract of April 28, 1933, specifically performed. The district judge excluded the ground of specific performance for the stated reasons (page 124, Transcript), that "the plaintiff did not itself discharge all its obligations under that agreement" and because as petitioner never received the final payment due from the United States it could not comply with a decree of specific performance and, hence, specific performance was impossible. The district judge was wrong in both these conclusions.

As to the first: The doctrine of specific performance is the right of a court of equity to compel the performance of a contract, where under all the circumstances it is just and equitable that it do so, and where no adequate remedy at law is afforded the moving party to the contract.

Generally the party seeking performance must have performed the contract on his part, because it would not be equitable to enforce one party to specifically and fully perform the contract on his part at the request of a party who had not himself performed. The object sought is to see that the purpose of the contract is consummated, that what is sought to be accomplished is accomplished. Full performance literally is not required, and the contract may be

specifically enforced by one party who has substantially performed it on his part. What is meant by substantial performance is for a court of equity to say, but generally means such performance as permits and accomplishes the purpose of the contract, and not such delinquency as retards or prevents its fulfillment. It does not mean the contract may not be enforced when the party seeking to enforce it has in some unimportant detail failed of performance; or where both parties have omitted to perform some unimportant detail, some detail not preventative or prohibitive of the consummation of the contract, particularly if such delinquency by each party is a similar delinquency; or where by mutual consent or acquiescence some detail is abandoned or not insisted upon. This contract (page 10, Transcript), was entered into for a definite purpose, and that was to make possible the completion of the contract for which petitioner was obligated, and to assure which respondent executed the surety bond. Both were interested in seeing that the contract was completed and neither wanted to suffer a loss. The letter leading to the making of the contract (page 12, Transcript), shows that petitioner, without assistance, was unable to proceed, and was soliciting from its surety such assistance as would make it possible to complete the contract. Petitioner recognized that this obligation was its own and that it would have to reimburse respondent for any money advanced for such purpose. It was intended that only such advancements as were necessary were to be made, and necessarily meant that no advancements should be made for the personal use of petitioner, or more than were

necessary to effect the purpose of the contract, that is, its completion.

There were unquestioned labor bills then due and those had to be paid in order for the work to go forward. For those needs, immediate advancements were necessary and were made. There were other labor bills, which if proven correct, were due. These, if determined to be correct, would have to be paid by advancement as there was no available fund out of which they could be paid. These were determined to be correct and an advancement made to pay them. The first items were paid by the respective advancements of $5,000.00 made by each party at the signing of the contract. The latter items were paid by the advancement of $5700.00 later made by respondent. By these advancements, all accrued obligations, which might delay the contract, were paid.

It apparently was in the minds of the parties that more money than the current estimates would supply might be necessary to keep the work going. So it was provided in the contract that the petitioner would "deposit from time to time certain other sums of money to be used toward the completion of said contract" (page 10, Transcript), and that respondent would in addition to the deposit of $5,000.00 necessary to care for the acknowledged due labor claims, deposit additional moneys to pay the unpaid disputed labor claims, and would deposit "also sufficient money to complete the Giamberardino & Sons contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory." Petitioner did not, thereafter, "deposit from time to time certain other sums of money to be used toward the

completion of said contract." This, of course, meant other moneys than that derived from the contract for other provisions were made for the deposit of the payments made on the contract. That this was the meaning of such statement is indicated by the letter leading to the contract, where petitioner states that if the specific assistance then required was furnished, the petitioner's bank would advance the money to complete the contract (page 13, Transcript). We think no other interpretation can be given of this obligation than that if the current estimates were not sufficient to keep the work progressing, the petitioner through its bank's help, would furnish the money to do so.

Respondent did not thereafter, in addition to the $10,700.00 advanced by it, deposit "also sufficient money to complete the Giamberardino plastering contract." This, by the same course of reasoning, applied to petitioner's obligation, meant that such money would be advanced as was necessary to complete such contract if it was necessary in addition to the current estimate, to keep the contract going. No specific amount was mentioned, and no specific time of payment was fixed in either instance. Only sufficient to complete the contract. The contract was completed with the current payments on the contract, without either making further advancements. So far as the record shows, no delay or disadvantage was occasioned to either party by such failure. The purpose of the contract was accomplished without such advancements. The contract was clearly substantially performed by respondent. The failure, if a failure it was, was immaterial in view of all the circumstances, and was only

such failure as petitioner itself committed. The real purpose of the contract was to make available, to assure respondent that all the moneys thereafter received from the contract would be available, not only for the completion of the contract, but also for the payment of bills for labor performed and materials used in the construction of the buildings. And now, after the purpose for which the obligated payments were to be available has been accomplished without such advancements being made, it would be highly inequitable to refuse the performance of the real purpose of the contract.

The petitioner, having defaulted in the same particular, cannot be heard to complain of default of respondent. However, in addition to all that has been said, the petitioner acquiesced in such failure, if failure it was. As stated, the real purpose of the contract was the deposit in escrow of the payments, and after the charged default of respondent, petitioner continued to send for deposit in accordance with the contract, all subsequent estimates, until the final payment. And only when it is sought to enforce such contract by action is the question of performance by respondent raised. Such acquiescence is further demonstrated by the evidence offered or brought out by petitioner in support of its defense of non-performance. This evidence appears in the testimony of H. F. Morley, the president of petitioner, and of James F. Kelly, respondent's local representative. Morley, petitioner's president, was offered by respondent as a witness. On cross examination, he testified that when the first month's work was done by the plaster contractor, who had taken over the Giamberardino con-

tract, he requested Kelly, representing respondent on the work, to give him the money to make payment, and that Kelly advised him to pay it out of the funds in the joint account (page 81, Transcript). So far as the record shows, Morley did not demur to this. When next month's payment came due and request was made to Kelly that the money be advanced, Kelly again suggested that it be paid out of the joint account and the same thing occurred at the third month (page 81, Transcript). And neither time did Morley demur or make demand, and each time paid it out of the joint funds and on neither occasion was the work stopped or delayed. Morley testified shortly thereafter Kelly told him respondent was not going to put any more money in the account. There is nothing in the record to show that Morley demurred to this suggestion or to show that such action of respondent delayed or prevented the completion of the work. Morley never made any further demand upon Kelly for advancement (page 81, Transcript) and the work progressed to completion without delay by the use of current estimates and without the necessity of any advancement by either petitioner or respondent.

Kelly testified (page 91, Transcript) that when an estimate became due, he asked Morley if he was going to pay that part of the plasterer's contract out of the estimate as had been understood, and that Morley did so. That Morley did not ask him to pay the plasterer's estimate and witness told Morley to pay the plasterer's estimates out of the estimates coming due. Clearly this testimony shows such mutual action and acquiescence as would constitute what was done, a substantial performance

by respondent, with acquiescence by petitioner in respondent's action.

Acquiescence by petitioner in the modification of the contract of April 28, 1933, or in the deviation from it, which was afterwards carried out, deprives the conduct of respondent of any taint of inequity.

Becker v. *Becker*, 250 Ill. 117, 95 N. E. 70.

In discussing the right to specific performance, the court in *Shubert* v. *Woodward*, 167 Fed. 47, said, l. c. 54:

> "The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules and practice of equity jurisprudence. *Hennessey* v. *Woolworth*, 128 U. S. 442, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules and this practice hard, fast or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience, and by them the judicial discretion of the court must be guided."

In distinguishing between what will and what will not preclude relief of specific performance, the Circuit Court of Appeals, with the comments that in the instant case relief of specific performance can be granted without violence to the stated rule, refers to the case of *Michigan Pipe Company* v. *Fremont Ditch, Pipe Line & Reservoir Co.*, 111 Fed. 284 (C.C.A. 8), where it is stated:

> "A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning

> which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit."

Petitioner in its answer alleges failure of respondent to make the additional deposit required by the contract (for the completion of the Giamberardino contract) and says "and for said reason the said contract was broken by said plaintiff to the great damage of the defendant, Morley Construction Company." In connection with this allegation, after referring to the testimony of Morley (page 81, Transcript) and Kelly (page 91, Transcript) the Circuit Court of Appeals makes this applicable comment on the circumstances surrounding the transaction:

> "But other considerations must be kept in mind. The Morley Construction Company was insolvent. The contract, Exhibit 'A,' was entered into for the purpose of extricating the defendant, Morley Construction Company, from financial difficulties in connection with the construction contract, and for completing the construction contract. This was the purpose of establishing the joint account provided for in Exhibit 'A.' This purpose was accomplished. The construction contract was completed to the satisfaction of the United States Government, and final payment ordered."

As showing that no violence had been done to the contract or its completion affected by the alleged breach of respondent, it appeared that after the completion of the work, there still remained in the joint account without

which the work had been completed, the sum of $7900.00. This amount was accumulated by Morley, after carrying on the work (pages 83-84, Transcript) and was available and should have been used, if necessary, before either petitioner or respondent should have been required to make any further advancements.

In *Fitzgerald* v. *Remick*, 43 Ia. 498, the question was whether or not the party seeking to enforce the contract by a railroad company, had complied with the contract upon its part when it had located its railroad station at a place and in a manner different from, but substantially as provided in the contract. The court says:

> "Hold: then, that the parties, in fixing the location, intended that the depot should be on five acres in the form of a square on the north or west of the land in dispute, and as in such form it could not join along the whole line, our conclusion is that there has been a substantial compliance with the contract, and this is all that is required."

In *Work* v. *Welsh*, 43 N. E. 719, 160 Ill. 468, an action was brought to specifically enforce a contract for the conveyance of certain land. The condition of the contract required that before such conveyance should be required, the corporation to whom the conveyance was to be made should be organized with a capital stock of $100,000.00 and that the corporation as organized should build a certain factory building on the land, which no doubt enhanced the value of the adjoining property owned by the other party to the contract. The stock was not all subscribed and objection was made that the

furniture company had not fully performed its part of the contract. The court said:

> "It is perhaps true, as suggested, that had all the subscriptions to the capital stock of this company been fully paid, it would not have been overcome by financial reverses. Haegg was himself a subscriber to the amount of $5,000.00 and paid no part thereof. (Haegg was one of the parties to the contract for the conveyance of the land.) Appellant standing in his position and with no greater equitable or legal rights, cannot with good grace ask this court to work a forfeiture of all this property and give him the benefit thereof for the failure to fulfill a condition which appellant's grantee had himself broken. The Circuit Court on a hearing of testimony, partly oral, found that there had been a substantial compliance on the part of the Peoples Mantle & Furniture Company of the conditions with this purpose. Such a compliance as this was satisfactory to the Haeggs and to such an extent that neither they nor their successors or assigns have any right to deny any such fulfillment or compliance. We hold there was no error in the rendition of this decree. From our view of the case, no other decree would have been in accord with equity and good conscience."

In the case of *Van Dyke* v. *Cole*, 70 Atl. 593, 81 Vt. 379, in an action for specific performance, the defendants alleged by way of defense, that the plaintiff in violation of the contract had cut certain timber from the land. After discussing the facts and commenting on the comparatively small value of the timber cut, the court said:

> "In these circumstances, specific performance should be decreed, for thereby the orators will receive justice by way of full compensation while a denial of such relief would leave the defendant without any adequate remedy on his contract, and result in great hardship and injustice to him."

In the *City of LaFollette* v. *LaFollette Water, Light & Telephone Company,* 252 Fed. 762, an action was brought by the defendant, an utility company, to enforce the specific performance of a contract made with the city. The city in defense, set up that the utility company had not fully performed in all details the contract as to the furnishing of certain lights and other insignificant parts of the contract. The United States Circuit Court of Appeals for the Sixth Circuit, recognizing that a substantial performance of the contract was all that was necessary states, l. c. 768:

> "The question as to whether the plaintiff has substantially performed the contract on its part so as to now entitle it to a decree of specific performance presents greater difficulty."

Again quoting from the opinion of the district judge, whose decision was affirmed, the opinion states:

> "And I am of opinion that a substantial performance of that portion of the contract relating to private service to consumers with its implied terms, is essential in order to entitle the plaintiff to a decree against the city for specific performance of that portion of the contract relating to public service, as well as substantial performance of those provisions of the contract relating to public service."

In the case of *Taylor* v. *Longworth,* 14 Peters 172, this court in discussing this question says:

> "In the first place, there is no doubt that time may be the essence of the contract for the sale of property. It may be made so by the express stipulations of the parties, or it may rise by implication from the very nature of the property or the avowed objects of the seller or purchaser, and even when

time is not thus either expressedly or impliedly the essence of the contract, if a party seeking a specific performance has been guilty of gross laches or has been inexcusably negligent in performing the contract on his part, affecting the rights, interest or obligations of the parties; in all such cases, courts of equity will refuse to decree any specific performance on the ground that it would be inequitable and unjust.

"But, under circumstances of this sort, or of an analogous nature, time is not treated by the courts of equity as the essence of the contract; and relief will be decreed to the party who seeks it if he has not been grossly negligent and has come within a reasonable time, although he had not complied with the strict terms of the contract."

In the case of *Shaw* v. *Livermore*, Vol. II, Greene's Reports (Ia.) 338, in discussing this question, the court says:

"It is urged that complainants are not entitled to a specific performance, because Dutton had not performed his part of the agreement. But we think this objection is not maintained by the facts as they appear in the bill, answer and depositions. They disclose no serious default on the part of Dutton. He appears to have acted in good faith and to have taken all necessary steps towards a substantial compliance with the terms of the agreement. He appears to have built a house and the fence upon the lot as stipulated; to have tendered the money and demanded a deed, and to have resided upon the premises as a carpenter and joiner for nearly two years before he sold his interest to Livermore, and it is not pretended that these things were not done within a reasonable time. At least, the important conditions which would entitle him to a deed from Shaw appear to have been performed with ordinary diligence. If

> the facts in this case had indicated gross laches or inexcusable negligence in performing the conditions of the contract on the part of the complainant or if, after the inception of the agreement, and the refusal of the respondent to execute the deed, those facts had shown a material charge affecting the rights and obligations of the parties, the broad, equitable and just rules of chancery jurisprudence would be violated by enforcing a specific performance of the contract. But on the other hand, this court will extend relief to the party who seeks it, even if there has not been a strict legal compliance with the terms of the contract, where such non-compliance does not affect the essence of the agreement, does no violence to the manifest intention of the parties, nor shows gross negligence in the complainant. 2 Story's Eq. Jr., Secs. 771-776-777; *Taylor* v. *Longworth*, 14 Peters 172, 175."

In *Bell* v. *Warren*, 39 Tex. 106, l. c. 110, the court says:

> "The case referred to does not assume a doctrine different from that which we propose to lay down in this case, and yet we hold that if York in his lifetime, did so far execute the trust, in the selection of the land and procuring its location, that any person could have advanced the money and lifted the patent, and done any other such act as could be done by one person as well as another, then the contract was substantially complied with and equity will enforce its performance."

The District Court was wrong in his conclusion that specific performance was impossible. This was an action *in personam*. The United States Government was making no claim to any part of the fund represented by the warrant, and absent the restraint imposed upon it by the proceeding brought by respondent in Washington, would turn over and pay the warrant. Certainly by the

joint action of petitioner and respondent, the fund could be immediately made available. Both petitioner and respondent are in court, subject to the court's orders, and could be made to do such things as would make the fund available for the purposes for which specific performance was sought. The Circuit Court of Appeals, we think, correctly answers this objection, as follows (page 135, Transcript), *Morley Const. Co.* v. *Maryland*, 84 Fed. (2) 522:

> "Nor do we think a decree for specific performance of the contract, Exhibit 'A,' is impossible of being carried out. A court of equity should mould its decree to meet the exigencies of the situation. What the plaintiff is seeking by its present complaint is to have the moneys still coming to defendant under the construction contract applied to payment of bills for labor and materials furnished for the completion of the construction. The circumstances appearing in the record warrant such an application. That such moneys come within the provisions of the contract, Exhibit 'A,' we think too clear for argument. An injunction against using the moneys except as agreed upon, and an order to place said moneys when received in the joint account and disburse the same in payment of just claims for labor or materials, would meet the requirements and rights of plaintiff and would not be impossible of performance."

It would seem from these authorities and from any equitable consideration of the situation that when all of the material portion of the contract had been performed, and when the object for which it was given had been accomplished, that respondent was entitled to have the substantial portion of the contract specifically enforced and that the district judge should have decreed specific performance of the contract.

What we have here said under paragraph II of this argument is in answer to paragraph II, page 26 of petitioner's brief, and paragraph III on page 31 of the same brief, which are both directed to the same legal proposition.

III.

The contract of April 28, 1933, Exhibit "A," was the original and existing contract covering the deposit in the M. & T. Trust Company.

Under Section IV on page 34 of its brief, petitioner apparently is attempting to state that the contract, Exhibit "A," was superseded by some other contract and superseded by the substitution of H. F. Morley in the place of the Morley Construction Company in the joint account. Exhibit "A" (page 10, Transcript) was the original contract. After its execution, it became necessary to notify the M. & T. Trust Company of the terms of this contract, and there was prepared a contract to the same purpose which served as a direction or notification to the M. & T. Trust Company of the execution of the prior contract and embodied in it the directions and conditions upon which the M. & T. Trust Company was to permit the withdrawals from this joint account. This is shown as Defendant's Exhibit 3 (page 77 of the Transcript), a reading of which readily shows it simply to be a direction to the M. & T. Trust Company as to the manner of distribution under contract, Exhibit "A."

The substitution of the name of H. F. Morley in the joint account on June 23, 1933, in no wise affects the con-

tract. It was simply made for the convenience of the Morley Construction Company and did not in anywise change the original agreement.

IV.

The contract of April 28, 1933, did not constitute an assignment in violation of Section 203, Title 31, U.S.C.A.

In paragraph V on page 35 of the petitioner's brief, the statement is made by petitioner that the contract of April 28, 1933, Exhibit "A," was an assignment or an attempt to assign the claim of the Morley Construction Company against the Government, and that by reason of the prohibition against the assignment contained in Section 203, Title 31, U.S.C.A., the contract was void. This contract in no sense purports to be, nor is it an assignment of the proceeds in the contract. It is simply an agreement by which the petitioner agrees that when he receives from the Government the payments under the contract, that he will deposit them in the joint account in Buffalo. The case cited under that paragraph is in no wise in point in the instant case.

V.

The statement made in paragraph VI on page 38 of petitioner's brief attempts to state a substantial breach by respondent of the contract of April 28, 1933. We have heretofore thoroughly discussed the alleged breach of the contract in Section II of this argument.

VI.

Under paragraph VII of the petitioner's brief, on page 39, the statement is made by petitioner that respondent had no right to have the check or warrant impressed with a trust in its favor or in favor of persons supplying labor and materials, since the check or warrant was received in the ordinary course of a contractor's business, and constituted a part of its resources of executing contract to the United States, and follows this statement with the statement that a statute prohibiting our assigning claims against the Government, denies such right of respondent.

It is not necessary in order to give the relief requested here to impress this fund with a trust. It was not sought in anywise in this proceeding to bind the Government. It was simply sought to so establish this fund as to assure its use in the payment of bills for labor and material, and by whatever name it might be called, the court had the right to make such order directed to the petitioner as it saw fit, whether the effect of the same was to impress the fund with a trust or simply a direction to the petitioner to see that the fund was used for the purposes agreed upon, and for purposes to which the respondent was entitled to have it applied. The case referred to under this section does not in anywise deny this right.

VII.

Respondent was entitled to exoneration by its principal, the petitioner, out of the funds resulting from the construction work covered by the contract, to assure which respondent executed the performance bond.

The United States Circuit Court of Appeals was wrong in its suggestion that the right of exoneration did

not lie because the period of six months, within which the Government had the prior right to resort to the bond, had not expired, and because the time within which labor and material claimants might file their actions had not yet arrived when the suit was filed. The obligation of respondent to pay labor and material claimants was consummate as soon as the contracts for such labor and materials were made and the work under the same finished. Its liability was then established and the debt was then created. The mere fact that the time for filing suit was delayed did not in anywise change this fact that the respondent was obligated to the labor and material claimants before the time for the bringing of the suit arrived. The benefits of exoneration in all probability would have been defeated had respondent been required to await the bringing of its action of exoneration until the expiration of the six months' period, for the petitioner could and probably would have disposed of the proceeds of this warrant, or a portion thereof, and have put it beyond the right of any court to cause such proceeds to be used in exoneration of respondent.

Exoneration in this case is the right of the surety to have the principal use all funds derived from the contract which the surety guaranteed to be used in payment of the obligations under the contract and under the bond.

The District Court, in its memorandum opinion, sets out its findings of fact, in which it finds that on or about April 27, 1933, the Morley Construction Company became involved in financial difficulties and was unable to proceed with its contract without pecuniary aid from the Maryland Casualty Company (page 120, Transcript of

the Record). The court further found that on or about that date the agreement of April 28, 1933, was entered into, under which it was agreed that all moneys and estimates thereafter received should be deposited in the joint account, it being intended and understood that it was a part of the agreement that the moneys to be so deposited should include the final payment under the contract made by the United States, as well as all other payments made under the contract by the United States (page 117, Transcript of the Record). The court further found that there was due from the United States Government the sum of $59,780.82, and found that, notwithstanding the fact that under the agreement all moneys were to be sent to the M. & T. Trust Company at Buffalo, the Morley Construction Company, contrary to the agreement, had directed the United States Government to send the warrant representing this last payment to it at Kansas City, and not to the M. & T. Trust Company, as the other warrants had been sent after the agreement was entered into (page 117, Transcript of the Record). The court found that at the time of the agreement of April 28, 1933, the Morley Construction Company was insolvent and found that it was insolvent when the bill in the present case was filed (page 123, Transcript of the Record). The court further found that when the bill in this case was filed there were claims against the Morley Construction Company for labor and material furnished on the Batavia contract in an amount exceeding $100,000, which were due and payable, and that the time at which suits might be independently filed against the Casualty Company, as surety, had not yet arrived when the bill was filed. The court then found that, while it was not

the intention of the Morley Construction Company nor its officers, when the bill was filed, to use the proceeds of the warrant for any purpose other than the payment of labor, materials and claims on the Batavia contract, the Casualty Company had reason to apprehend that such was their intention (page 123, Transcript of the Record). We might say here, by way of interpolation, that the court in this statement that the Morley Construction Company did not intend to use the proceeds of this warranty for any other purpose than the payment of the labor and material claims, apparently has overlooked the position of the Morley Construction Company, as stated by its counsel during the trial of the case shown on page 112, Transcript of the Record, which is as follows:

> "Q. However, Your Honor, since he has stated what they are willing to do, we offer to deposit this money in the First National Bank here or any other bank, together with a list of all the bills payable on this job, with instructions on the bank that no check should be paid except in the reduction or settlement of one of those bills, and the further provision that any expenses of prosecuting these claims against defaulting contractors or the government should also be paid from this fund.
>
> Mr. Harris: Subject to our supervision.
>
> Mr. Ellison: We object to the joint control."

It is perfectly apparent from this statement what was the reason why the Morley Construction Company diverted this check by its direction to the United States government to send it to them in Kansas City and why, after it was discovered that they had done so, they refused to then have the check sent and disbursed as all of

the other moneys had been under the joint account to the payment of bills for labor and material. It is perfectly apparent that it was their intention that they should assume complete and sole control of the funds to be disbursed by them without any supervision or control by the Maryland Casualty Company, and that they intended to use the same in the payment of counsel fees and expenses in attempting to prosecute their alleged claims against alleged defaulting sub-contractors to any amount which they might desire and to an extent that would necessarily diminish the funds available for the payment of labor and material claims, which, perhaps, explains the reason for the defense in this action.

The District Court on its findings held that the plaintiff was entitled to exoneration by the defendant and that when the bill was filed the claims against defendant, Morley Construction Company, of those who had furnished labor and materials on the Batavia contract in the amount of more than $100,000 had matured and were due and payable, and that immediately this became true the liability of the Maryland Casualty Company arose, and contemporaneously with its liability, its right to exoneration in equity came into being, quoting from Ruling Case Law the statement:

> "No principle in equity is more familiar or more firmly established than that a surety, after the debt for which he is liable has become due, without paying or being called upon to pay it, may file a bill in equity in the nature of a bill *quia timet* to compel the principal debtor to exonerate him from liability by its payment" (page 124, Transcript of the Record).

The District Court in its findings comments upon the position taken by counsel for the Morley Construction Company that, inasmuch as the labor and material claimants could not sue the Surety Company until the expiration of six months, therefore, the Maryland Casualty Company's right of exoneration, which they admitted, did not come into being until the expiration of the six months' period, which was subsequent to the date of the filing of the bill. The court in its further finding and in answer to that contention and running back to its quotation from 21 R. C. L. 146, found:

> "* * * But under the rule stated, the right to exonerate begins when liability begins. The cited statute in effect provides that the surety's liability shall begin when the principal fails promptly to pay those furnishing labor and materials.
>
> The plaintiff then is entitled to a decree requiring the defendant to pay all labor and material claims arising in connection with the Batavia contract for which the plaintiff is liable under its bond and to apply to such payment any money it has or will realize from assets now possessed by it, including its claim against the United States on account of that contract" (page 124, Transcript of Record).

On these findings of fact the court entered the decree of exoneration which is shown on page 37 of the Transcript of the Record.

The issue of law thus presented is clear and simple. The defendant concedes the theory of the doctrine of exoneration as we see it, and the court found that they had conceded that under the conditions obtaining, the Maryland Casualty Company would be entitled to exoneration, except that they say although the right of

exoneration existed, it could not be enforced until the time came when the claimants for labor and material could actually bring suit against the Maryland Casualty Company on the bond. So, the issue is whether, as a matter of law, the right to enforce the Maryland Casualty Company's right of exoneration began when the obligations, for which it was liable, were due and payable by the Morley Construction Company, which had incurred the bills, or whether such right did not begin until such time as the labor and material claimants might have sued not only the Morley Construction Company, but the Maryland Casualty Company.

There is no question raised but that the right to enforce such obligations by the labor and material claimants, as against Morley Construction Company, existed at the time this bill was filed. The building was completed about July 9, 1933, and the whole work accepted November 9, 1933 (Tr. 18). So that all of the material for which claims were being made had been installed in the building prior to July 9, 1933, and all the labor, excepting the grading of the grounds, had been performed prior to July 9, 1933. Any claimant, in the absence of a contract to the contrary, which does not appear, could have brought suit against the Morley Construction Company, irrespective of the Heard Act, upon or after the delivery of the materials or performance of their work. So that there is no question but that, as to the Morley Construction Company, not only the liability but the right to enforce the liability, existed long prior to the time the bill was filed. So, the only question that remains is, whether or not the liability of the Mary-

land Casualty Company had accrued so that its right to be exonerated had come into being.

Perhaps it might be well at this time to examine the situation with reference to the right existing in the Government for the first six months following the completion of the contract to sue upon the bond. The bond, under the Heard Act, is given, primarily, to assure the Government of the completion of the work and, secondarily, to assure the persons furnishing labor and material on the work the payment of their bills to the extent of the bond, providing the penalty thereof is not consumed by the Government in the event of the failure of the contractor to perform his contract. Although we do not concede that the right to exoneration would not begin until after the Government's claim, if any, for failure to perform the contract had been satisfied, we may do so for the sake of the argument. Assuming such to be the effect, it at once appears from the record that the Government not only had not asserted, but did not have any right of action or recourse on the bond. It appears beyond question that on or about November 9, 1933, the Government accepted the building and the work as completed and acknowledged the performance of the contract by the Morley Construction Company and issued to the Morley Construction Company its check for the final payment. So that, although the right to sue for the first six months was given to the Government, it appears at the time the bill was filed that the Government had no right to sue, because it had accepted the work as complete in accordance with the contract and had issued its payment for the same. The restriction on the rights to sue

is not effective in all instances. If the United States should on the next day after the completion of the work file suit on the bond the materialmen could at once intervene in such suit and establish their rights of recovery before the expiration of the six months' period. So clearly the liability accrued prior to the expiration of the six months' period.

The controversy arises over the contention of petitioner that the right of exoneration of the respondent did not arise until after the right to sue it had accrued, and not upon the accrual of the liability. In support of this contention appellant has cited cases in which it is held that the right of exoneration comes into being when the debt for which the surety has obligated itself becomes due, and cites and quotes from cases which hold that the right of the surety to exoneration does not come into being until the debt for which it has obligated itself becomes due. These very words are used in the opinions, but an examination will show that in each such case the debt is not due from the principal and, therefore, of necessity, is not due from the surety. The words are used in connection with the facts in each particular case. There is no case which presents the facts which are here presented. The cases to which petitioners refer the court are cases by endorsers of notes who became fearful of their obligation and sought to require the maker, whose payment they guaranteed, to exonerate them before the note itself became due by the principal, which, of course, is not the reason for the right of exoneration. A liability in one sense always accrues immediately upon the signing by a surety or an endorser. The exact minute

the endorser of a note signs, he accepts a liability and the very minute a surety signs a bond for the payment of a contract or the payment for labor and material, it accepts a liability which may or may not ripen into an obligation. The liability becomes fixed when the obligation of the principal matures, and when the obligation of the principal matures the liability of the surety accrues, the amount thereof only to be determined upon the enforcement of the obligation.

Practically all burglary policies of insurance and many obligations for life benefits and for disability benefits provide that no suit shall be brought for a period of thirty or sixty days, or longer, but the liability ripens into an obligation when the loss occurs under the policy, and in this case the liability which accrued immediately upon the signing of the bond ripens into an obligation when the material or labor, for the payment of which the surety gives its assurance, becomes a matured obligation on the part of the principal, even though the right to enforce it against the surety is postponed for one or another reason. If it had happened that the Government had made a claim that the contractor had not performed his contract, by reason of which the Government brought a suit upon the bond, this could not affect the liability of the surety company. Such an action by the Government might be brought within six months, and might not be finally determined for years, but the obligation or liability of the surety company would not be deferred until after the final determination of the action brought by the Government, which, as we say, might be years. The only thing that is deferred is the determination of

the amount for which the surety company might be liable to the claimants for labor and material, which could only be determined after the suit of the Government had been terminated so that it could be determined whether or not the Government consumed the full penalty of the bond, and, if not, to what extent. The only thing that would be deferred would be, not the right of the materialmen against the surety on the bond, but the amount which they might be able to recover, dependent upon the extent to which the Government's action had consumed the penalty of the bond.

In order to get the legal principle as fixed by the commentators on the law, we desire to quote more fully from the paragraph quoted by Judge Otis in his findings.

In 21 Ruling Case Law, paragraph 146, on pages 1110 and 1111, the law, including that stated by Judge Otis, is set out as follows:

> "No principle in equity is more familiar or more firmly established than that a surety, after the debt for which he is liable has become due, without paying or being called on to pay it, may file a bill in equity in the nature of a bill *quia timet* to compel the principal debtor to exonerate him from liability by its payment, provided no rights of the creditor are prejudiced thereby * * * The right of the surety thus to be exonerated from liability is founded on equitable principles—the *prima facie* duty of the principal to pay the debt, the fact that it is unreasonable that the surety should be burdened with liability and should have a cloud always hanging over him at the will of the creditor even though he is not molested for the debt, and the risk of ultimate loss. A surety may apply to a court of equity for protection as

soon as he is in danger and upon a bill by the surety to compel the payment of the debt by the principal without notice to the creditor of the surety nor an allegation of irreparable injury, if the surety is compelled to pay the debt, constitutes an essential element of the surety's right to equitable relief, and a bill by the surety to compel the principal to pay the debt need not allege an attempt by the creditor to enforce such liability against the plaintiff."

In the case of *Southwestern Surety Co.* v. *Wells*, 217 Fed. 294, being a decision of a district court in Pennsylvania, the facts are not set out or discussed. It appears from the opinion that two bonds were given, upon both of which the complainant was surety. One was for completion of the work and one was for the payment for labor and material. The work was not completed; that is, at the time of the filing of the bill it would appear that the contractor was still in the performance of the job, although the time for completion had elapsed. The court apparently held that inasmuch as the job had not yet been completed, the amount of the *per diem* penalty had not accrued and as to such bond the complainant was not entitled to exoneration, which would appear to be a correct holding, as the obligation could not be determined until the completion of the work. The other bond was for the payment of labor and material. There is nothing in the opinion to indicate whether there was any time within which the labor and material claimants could or could not sue, but it is apparent that the amount of material and labor bills or claims for which the complainant was seeking exoneration was determined, and the court held in that case that as to the bond covering

the payment of labor and material bills, the complainant was entitled to exoneration. The condition in the material and labor bond, no doubt, was that the principal should pay all bills for labor and material, and the court says, l. c. 295:

> "This equitable doctrine of exoneration is analogous to, at least is often coupled with, the legal principle which permits the obligee in an indemnity bond to maintain his action as soon as the claim was made. He need not await the beginning of an action against him. He may stand on default in the condition to save him from the harassment, claims and demands."

The condition on the default of which he may stand is the condition that the principal will pay the claims and demands. The principal is not obligated to pay claims and demands until they are due against him, but when they become due and he does not pay them, there then arises a default in the condition, which, according to this authority, gives rise to the right of exoneration by the surety. Unquestionably, all of the claims as shown by the exhibit opposite page 88 of the Transcript of the Record were due by the Morley Construction Company, as they are listed as obligations of the company. The failure to pay them clearly was a breach of the condition of the bond.

The doctrine of exoneration in itself is too firmly recognized to require the citation of any authorities and it is only necessary to apply the known principles to the facts involved. The primary purpose, of course, is to protect the surety as against his principal and to require the principal to pay the obligation which is

primarily his, but which the surety has guaranteed. The question of the maturity of the debt is involved and where there are creditors whose rights are adverse to those of the surety, the question has arisen as to the necessity for the making of such creditors parties to the action. But where there are no creditors asserting any interest adverse to the rights claimed by the surety; that is, where there are no creditors other than those for whose benefit the surety is seeking to apply by way of exoneration certain funds arising out of the contract, the necessity for the making of the creditors parties, does not arise and the creditors are not necessary parties. The question of the necessity for creditors as parties will be hereafter discussed.

One of the late cases decided by the 5th Circuit Court of Appeals, 1932, is that of *Glades County* v. *Detroit Fidelity Company,* 57 Fed. (2) 449. In that case the contractor had made an agreement to construct a court house, and for the performance of the contract and for the payment of labor and material bills, gave to the county its bond with the Detroit company as surety. The contractor completed the contract, but left a number of unpaid bills. There still remained in the hands of the county part of the contract price. The contractor became bankrupt and a trustee in bankruptcy was appointed. The surety company filed its bill in equity to require that the money remaining on the unpaid contract price should be paid and disbursed to materialmen in exoneration of the surety company's obligation on its bond. No other persons were parties to this bill. The court in sustaining

the right of the surety company to have this fund disbursed in exoneration of its liability, says, l. c. 451:

> "The bond exhibited by the bill is conditioned that the contractor shall fulfill its contract with the county 'and shall fully and promptly pay the wages of all laborers, workmen and mechanics employed by it or its sub-contractors on said work, and shall fully and promptly pay the claims of all persons who furnish materials and supplies used in the construction of said building.' The bond is plainly given under the statute and to be construed in the light of it. It operates as a security to the county for the performance of the contract, and also as a security to the laborers and materialmen for their payment, and in this sense embraces two bonds. . . . In its second alternative aspect, the bill, in case its defense of breach by the county fails, acknowledges liability to the materialmen and professes a willingness to pay them; but sets up the bankruptcy of the contractor, and that the trustee in bankruptcy insists that what is due by the county on the contract is general funds in bankruptcy not specially applicable to the claims of the materialmen, and is suing the county in a state court to collect and so apply them; that the surety is about to have to pay the materialmen, but in equity is entitled to exoneration by use of the sum due from the county; and it seeks an account of the same and an application of it to the materialmen's claims, the surety to be held only for the balance. In this aspect the bill has equity. We are now dealing with the surety's obligation to the materialmen only. The principal has failed to discharge his obligation when due, is insolvent, and his representative in effect refuses to discharge it. As between the surety and the principal there arises without payment by the surety and without his having even been sued, an equity of exoneration. . . . In case of exoneration he proceeds before payment *quia timet*, and seeks to have payment made to the

creditor. If the principal is solvent, the decree need not go further than to require the principal to pay, but, when he is fraudulent, insolvent, or has absconded, the equity of exoneration needs and may have further protection. Injunctions, receivers and equitable garnishments have been granted, property recovered from third parties, and funds traced and applied. . . . Assuredly equity will require to be applied to the obligation a fund which by the very contract of suretyship stands as a security for performance. In Story, Eq. Jur., Sec. 1011, after stating the jurisdiction to protect the surety *quia timet*, there is added: 'And generally it may be stated that in case of contracts, express or implied, courts of equity will interpose to preserve the funds devoted to particular objects under such contracts and will decree what it is in effect specific performance, security to be given, or the fund will be placed under control of the court.' In *Walker* v. *Brown*, 165 U. S. 654, 17 S. Ct. 453, 457, 41 L. Ed. 865, it is held that: 'Every express executory agreement in writing whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other application . . . creates an equitable lien upon the property so indicated.' To the same effect is *Ingersoll* v. *Coram*, 211 U. S. 336, 29 S. Ct. 92, 53 L. Ed. 208. Such a fund is the reserve on a building contract. *Pratt Lumber Co.* v. *Gill* (D. C.), 278 F. 783, 798; *Cox* v. *New England Equitable Ins. Co.* (C.C.A.), 247 F. 955; *Prairie State Bank* v. *United States*, 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412; *Salt Lake City* v. *O'Connor*, 68 Utah 233, 249 P. 810, 816, 49 A. L. R. 941. The first and last cited were cases of exoneration. In the last there is a comprehensive review of the authorities with the result thus stated: 'We conclude that the unpaid contract price remaining in the hands of the city is charged with an equity in favor of the surety, which arose by virtue of the retention of the fund by the

city and in point of time relates back to the time the contract of suretyship was entered into, and is superior and paramount to any right of the contractor or his assignee.' Prairie State Bank vs. United States, though a case of subrogation, clearly indicates the status of the reserved payments as a fund for the security both of the obligee and the surety on the bond."

The bill in this case, so far as the application of the doctrine of exoneration is sought, sets up the relationship between the principal, appellant, and the surety, appellee, and recites the outstanding unpaid bills and recites the fund in the hands of the United States payable to the appellant in an amount less than the unpaid outstanding bills, and simply seeks to have the court by appropriate order direct that this fund be paid not to the surety by way of subrogation or not to the surety for any purpose, but only for the payment of the outstanding labor and material bills on the contract, to secure which the bond was given.

In the case of *U. S. F. & G.* v. *Bank of Brewton*, 4 Fed. Suppl. 272, decided by a District Court in Alabama in 1933, the question involved was one of subrogation, but in deciding the case, the court determines the status of the retent on a contract which had been assigned by the contractor to a bank. The court, in determining this question, says, l. c. 274:

"It is held, and I think correctly, in the cases already cited, that as long as this percentage held back to secure the performance of the contract can be identified and followed, it can be subjected in equity to the lien of the surety. There is no doubt

> in this case that the bank received and appropriated the proceeds of this check, and that such portion of it they did not retain was paid out by them in an effort to put it beyond the just claim of those who had the prior right to be paid out of it."

Perhaps the most cited case in the Federal decisions is the case of *Prairie State Bank* v. *United States*, 164 U. S. 227. In every case involving the question arising between the principal and surety by way not only of subrogation, but in exoneration, this case is cited as establishing the status of a fund representing a part of the contract price as between the surety and the principal, or anyone claiming under the principal. Without attempting to burden this record with the holding of the United States Supreme Court in that case, it may be said that the court held that any such fund such as the amount involved in this action is subject to the rights of the surety superior to any right which the contractor might attempt to create in some other persons, and that until the surety has been, in effect, exonerated, the rights of others in such fund do not accrue.

In the case of *Pavarini* v. *Title Guaranty & Surety Company*, 36 App. Cas. (D. C.) 348, Ann. Cas. 1912C, 367, a bill in equity *quia timet* was brought by surety upon the bond given to assure the completion by the principal of a hospital in the District of Columbia and to assure the payment of the bills incurred in such work. A sub-contractor had furnished certain boilers on the job and had demanded payment of the surety. The court sustained the contention of the surety company to exoneration, saying, l. c. 369:

> "The question then resolves itself into this: whether a surety who has not paid the secured debt is entitled to a decree compelling his principal to pay the debt in order to obtain his exoneration from responsibility. The great weight of authority seems to support the proposition that when the obligation has become due, the surety, without discharging it, may maintain a suit, in the nature of a bill *quia timet* to compel his principal to discharge it."

Under this Pavarini case, as shown in Ann. Cas. 1912C, on page 369, is a note setting out a large number of cases to support the general rule stated to be "The reported case is in harmony with the rule which is supported by the great weight of authority that a surety may, after the maturity of the suretyship debt, and without paying the same, maintain a suit in equity to compel his principal to pay the debt." We will not undertake here to cite or refer to all of these cases, but will hereafter discuss some of them.

In *West Huntsville Cotton Mills Co.* v. *Alter,* 164 Ala. 305, 51 So. 338, the court states the rule to be:

> "No principle in equity is more familiar or more firmly established than that a surety, after a debt for which he is liable, has become due without paying or being called on to pay; may file a bill in equity to compel the principal debtor to exonerate him from liability by its payment, provided no rights of the creditor are prejudiced thereby."

In the case of *Ferer* v. *Barrett,* 57 N. C. 455, an action in equity for exoneration was brought by the surety upon a bond conditioned for the payment of certain notes. The court says, l. c. 455:

> "It is the established doctrine in equity that a party, after the debt has become due, may, upon

the principle of *quia timet,* file his bill against the principal and the creditor to compel the former to make and the latter to accept payment; because those parties have no right, against his will, to keep him bound for a longer time than agreed for, so as to enlarge his risk of loss.

"Now, as between Ramson and Barrett, that is substantially the nature of this bill; and it can make no difference that a co-surety, Mosteller, and the creditor, Ferrer, are also plaintiffs, for, as regards the latter, it is only signifying his readiness to accept the payment with the consummation of the suit of the surety, and as regards to the former, asserting his interest in the question and sanctioning the discharge of the debt to his own exoneration. In that point of view the insolvency of the two sureties makes no difference. It might perhaps in the case of a certified bankrupt because the creditor could prove his debt under the commission and the surety and his property are already discharged. But that does not apply to an insolvent in our law, that is, one merely unable to pay his debts and not discharged upon his oath because his person is still liable. Moreover, if so discharged, his subsequent acquisitions may be taken for the debt and that is a danger from which he is entitled to protection. If the money were to go into the hands of the insolvent, it would be an unsurmountable objection to a recovery in law or in equity, as there is no security that he would apply properly and unless he did, the principal would still be liable to the creditor. But the object of all such suits is that the payment should be made to the creditor in satisfaction of the debt and in exoneration of all the parties."

In *Thomas* v. *St. Paul's M. E. Church,* 86 Ala. 138, the rule is stated:

"No principle of equity is more familiar or more firmly established than that a surety, after the debt

for which he is liable has become due without paying or being called on to pay it, may file a bill in equity to compel the principal debtor to exonerate him from liability by its payment, provided no rights of creditors are prejudiced thereby."

It will be noticed in this decision, as in a number of the others, the statement is made that the bill may be entertained after the debt for which the surety is liable has become due. In others, dependent on the facts in each particular case, a somewhat broader statement is made indicating that the surety may bring the bill for exoneration after his obligation becomes due. So far as the right of exoneration is concerned, these statements mean and hold the same thing. In practically every case in which the question is discussed, the right to bring action to recover from the surety accrues at the time of the right to bring action by the debtor, and the term "due" is used somewhat freely. The basis of the whole doctrine, however, is that when the debtor fails to pay the debt for which the bond is given, the right of exoneration accrues. This is necessarily true, for from that moment the cloud to which a number of the cases refer, begins hanging over the head of the surety and it would be idle to give to the surety a right of exoneration when although the debt has matured as to the debtor, the right to sue the surety on this debt which had already matured, is delayed in order to give someone who has a right under the bond prior to that of the creditor himself, a period of time within which to prosecute his right under the bond. As we have stated before, the liability of the surety as in this case, to the materialmen, becomes consummate upon the failure

of the debtor to pay the bill when due, and nothing that can thereafter occur will change this liability. The only thing that can occur is that by reason of the limit of the bond, some of it may be consumed by the application thereof to the prior right, as in this case, the right of the Government. The right of exoneration, it seems to us, would apply with more force in a case of this kind than if the intervening right of the Government did not exist. The cloud hangs over the surety. The fund by which the surety is seeking exoneration, cannot in any manner be obtained or affected by any right which the Government has under the bond. Even if there was a breach of the contract for which the Government had a right of action, its action is only on the bond and not against the fund, and during the attempted enforcement of this right by the Government, the insolvent principal may receive and dissipate the fund out of which the surety is seeking exoneration. For this reason, the petition of the surety company should present more equity to a court of chancery, because the danger incident to the dissipation of this fund is enlarged by the extension of the time permitted by the Government to enforce its rights, if any, against the bond. This period, as we have stated, might extend over a long period of time, during which the insolvent principal might and did express its intention to use a part of the fund other than for the payment of outstanding bills for labor and material on the Batavia job.

In *Hutchinson* v. *Brand,* 79 Kans. 340, 99 Pac. 592, the doctrine is stated thus:

"The only questions raised are whether the petition stated a cause of action, and whether the judgment rendered was a proper one. It is argued that a surety who has paid nothing can maintain no action unless he shows some special reasons for fearing loss as that his principal is about to make a fraudulent disposal of the property. The statute, however (Civ. Code, para. 529), explicitly gives him a right, whenever the debt is due, to sue to compel the principal to discharge it—a right which exists in equity independent of the statute. (27 A. & E. Ency. of L. 475; 16 Encyc. Pl. & Pr. 951.) An attempt of the principal to escape payment by fraud is made a ground of action even before the obligation matures (Civ. Code, para. 530)."

In the case of *Roberts* v. *American Bonding Company*, 83 Ill. App. 463, a deceased person had left certain real estate and also left a large amount of debts for which the real estate would be subject to sale in the probate court. The property was sold by the appellant, the legatee to whom it was devised, and received in payment $70,000.00 in certain bonds. The purchaser required, and was given a bond to protect the land against sale for the payment of debts. There were several thousand dollars in claims proved against the estate, and the principal in the bond filed a motion in the probate court to sell the real estate for the payment of debts. The land was not as yet sold and the liability of the surety, of course, did not accrue until the right of sale had been exercised through the probate court. In other words, the obligee in the bond could not have recovered under the bond against the surety which was on a bond of indemnity, until he had suffered a loss. The surety, however, filed

a bill in equity against the principal in the bond, asking that the principal be required to exonerate the surety by requiring the principal to sell and dispose of the bonds which he had procured as purchase price for the real estate, and out of the proceeds pay these debts and thus exonerate the surety from the payment of them. The court held the surety entitled to this right, stating:

> "As between the principal and appellee, the surety, appellant's duty was to pay the judgment of the probate court. The land she had sold and had been paid for is the only asset of the husband's estate out of which the judgments can be made, and she as executrix has begun proceedings to have the land sold to pay those judgments. According to the terms of the bond given to the purchaser of the land, a breach of the bond seems already to have occurred. Must appellee wait until judgment has been recovered against it for such breach before it can compel appellant to do her duty? It would seem not necessary to do so. There is nothing unliquidated or uncertain in amount. The judgment of the probate court exactly determines the debts of the estate of Roberts, deceased, against which Fuller was indemnified. Nor do we think it necessary that appellee should first pay either Fuller or the probate court judgments that threaten Fuller's title before appellant may be required to perform her legal and equitable duty. Fuller's land is liable for those judgments and both appellant and appellee are obliged to protect him against them. In respect of such obligation as between themselves, appellant is principal and, therefore, primarily liable. Both appellant and appellee hold a part of the mortgage bonds that were taken by the appellant in payment for the land and on their part nothing would be more equitable than a putting by them of said bonds in lieu of the land to satisfy the judgments. What is more equitable than that,

instead of having circuity of action, appellee may require appellant to bring into court her bonds there to be applied, along with those held by appellee and offered to be brought into court, under equitable rules, toward satisfying their joint liability?

"We think this is clearly a case where the surety shall not be required to wait until he has made payment before he may go into equity and compel the principal to pay the debt.

"It is a familiar doctrine of equity that a surety has the right, as against his principal, to be protected from loss by reason of his suretyship, so far as it can be done without prejudice to the rights of the creditor. And so equity will sometimes interfere and compel the principal to exonerate the surety, in advance of payment by or judgment against the surety if the debt is due and it can be done without prejudice to the rights of the creditor. The doctrine in such cases rests upon the simple right, as between principal and surety, that the surety has to be protected by the principal. The form in which that protection may be secured is not material when the right to it exists and can be had without prejudice to the creditor."

In the case of *Pratt Lumber Company* v. *Gill*, 278 Fed. 783, decided by the District Court in North Carolina, the question is presented as to the right of a surety to have a retained percentage under a contract applied to the payment of debts for labor and material on the contract. The question as presented is stated, l. c. 795:

"The question, therefore, to be decided is—What, if any, rights have the surety company in or to the retained percentage due T. H. Gill Company from the highway commission, to have the retained percentage applied to his exoneration of liability on the bond superior to the rights of the creditor representing general creditors?"

In deciding the case, the court refers to many authorities, some of which we have here discussed and among others cites with approval the holding in the Prairie State Bank case hereinbefore referred to, and the statement of the rule in *Town of Gastonia* v. *Engineering Company*, 131 N. C. 359, 42 S. E. 857, where the court said:

> "The American Surety Company having become surety to the engineering company for the faithful performance of said contract, upon any default of its principal by which it became liable on said bond, if it did not become subrogated to the rights of its principal on the bond, it is at least entitled to have it applied in payment of these claims for materials in exoneration of its liability therefor;" and

in the case of *Wells* v. *City of Philadelphia*, 270 Pa. 42, 112 Atl. 867, where the rule is stated:

> "As to any money retained, the surety then stands to that fund in the same position as the owner of the property to which the contract relates. The surety's relation through compulsion (default), dates even with the owner's relation. From this fund, and the unpaid contract price, it is entitled to sufficient to save itself from the loss on its suretyship engagement, nor can the contract, by assignment or otherwise, deprive it of this right."

Following the reference to the above cited cases and many others, the court says, l. c. 798:

> "The authorities cited sustain the right of the surety to have the retained percentages provided for in the contract, applied to the exoneration of loss sustained by breach of condition of the bond."

In *Stulz-Sickles Company* v. *Fredburn Corporation*, 169 Atl. 27, 114 N. J. Eq. 475, the National Surety Com-

pany was surety on the bond of the Fredburn Corporation for the construction of a certain highway. After the completion of the work, a receiver was appointed for the contractor, and the highway commission paid over the balance of the contract price to the receiver. The surety in a bill in equity prayed that the funds so arising from such contract be applied, first, to its right of subrogation, and, second, to its right of exoneration. The right of subrogation was abandoned as no claims had been paid, but the right of exoneration was pressed. The court granted the prayer for exoneration saying:

> "The right of exoneration is merely a right to have the fund applied to the payment of the guaranteed claims. Admittedly the surety is entitled to exoneration and the fund is correctly charged with an equity in favor of the surety to the extent that it be applied to the payment of laborers, materialmen and subcontractors, this right exists irrespective of statute. But it does not entitle the surety to custody or control of the fund . . . The petitioner's right to have the fund applied to the payment of the guaranteed claims (exoneration) will be effectively accomplished by the receiver under the supervision of this court."

In the case at bar, appellee does not request or pray for the custody or control of the fund. It simply prayed for the application of the amount due on the contract to be applied under the supervision of the court to the payment of bills for labor and material as was done in the case just cited.

In *Greenberg* v. *Leff,* 146 Atl. 196, 197, 104 N. J. Eq. 502, which is cited on page 52 of appellant's brief, the court makes this statement:

"But in equity, the surety's remedy is not necessarily confined, as at law, to obtaining indemnity after payment of debt. When protection can be afforded a surety without substantial injury to the creditors, a court of equity may award that relief without the debt being first paid by the surety. In such circumstances, the creditors may be restrained from selling the property of the surety until the property of the principal is first exhausted. Bills of that nature have been classed . . . as bills *quia timet.*"

There would seem to be little room for doubt under, not only the authorities to which we have made reference, but upon an analysis of those cited by appellants, that the appellee is entitled to be exonerated out of the proceeds of the warrant issued for the final payment on the contract on the Batavia job as against the bills for labor and material unless by the granting of such right, creditors of the appellant will be prejudiced.

The only creditors other than laborers and material claimants appear to have been the Maryland Casualty Company, appellee itself, which had advanced some $10,700.00, and an assigned claim to the Ithaca Trust Company from a creditor on the Batavia job. The Maryland Casualty Company itself is asking the relief and could not be heard to say that it was prejudiced. The claim of the Ithaca Trust Company, being an assigned claim growing out of the contract, would be in the same classification as the creditors represented by the claimants for labor and materials furnished, and they would be permitted to participate, and the exoneration requirement

would be as much for their benefit as for the benefit of the other labor and material claimants. The claimants for labor and material could not in anywise be prejudiced because the money was not sought for a purpose adverse to their interests, but was sought for the very purpose of paying them, so far as the money would go. No other creditor, even if there were any, would have any right to this fund, which was superior to the right of the surety company, to have it applied in payment of the bills for labor and material. The very fact that the prayer of the petition and the order of the court was that the money be deposited and disbursed in payment only for labor and material claims, clearly shows that the relief sought and the relief granted instead of being prejudicial to the creditors was for their benefit.

In *Bishop* v. *Day*, 13 Vt. 81, 31 Am. Dec. 582, the rule is stated:

> "After a debt has become due, a surety may resort to chancery to compel the principal to pay the debt that the surety may be exonerated from liability."

In *Holcombe* v. *Fetter*, 70 N. J. Eq. 300, 67 Atl. 1078, the rule is stated:

> "A surety may file a bill to compel payment by the principal debtor as soon as the debt becomes payable. The jurisdiction does not rest upon apprehended insolvency, but upon the fact that there is a debt due, which it is the duty of the principal debtor in exoneration of his sureties to pay forthwith."

See, also, *Dobie* v. *F. & C. of N. Y.*, 70 N. W. 482, 95 Wisc. 540.

Under the foregoing authorities, the District Court was clearly right in granting the relief of exoneration, and the United States Circuit Court of Appeals in error in its suggestion that the right of exoneration had not yet accrued.

VIII.

Summary of the Argument.

To sum up the argument here made by respondent, it is the contention of respondent:

First: That the United States Circuit Court of Appeals had jurisdiction in a case in equity to so modify the decree as to grant the relief which was given by the lower court, for any reason that appealed to such court, even though it granted the relief for a reason other than the reason upon which the District Court based its decree.

Second: That the United States Circuit Court of Appeals was correct in its finding that the respondent was entitled to have the contract of April 28, 1933, specifically performed, irrespective of whether or not there also existed a right of exoneration.

Third: That the contract of April 28, 1933, was binding and was not in anywise modified by any subsequent action by either of the parties so far as it obligated the application of the funds received from the Government to the payment of the bills for labor and material.

Fourth: That the contract of April 28, 1933, was in nowise an assignment of the funds and was not a violation of Section 203, Title 31, U.S.C.A.

Fifth: That in addition to the right of specific performance, the respondent was entitled to have a decree which required the money in the hands of the Government and representing the balance of the contract price, to be applied in payment of the unpaid bills for labor and material performed and used in the construction of the buildings at Batavia, New York, whether it be denominated a right by exoneration or whether it be denominated a trust or lien against the funds.

Respectfully submitted,

JOHN C. GROVER,
PAUL G. KOONTZ,
Attorneys for Respondent.

SPENCER F. HARRIS,
GEORGE E. CUSHWA,
ROGER J. WHITEFORD,
Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 325.

MORLEY CONSTRUCTION COMPANY, A CORPORATION, AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, A CORPORATION, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

ON CERTIORARI.

Motion for Order Restraining Respondent from Proceeding in the United States Court for the Western District of New York in the Cause Entitled United States for Use of Johnson vs. Morley Construction Company and Maryland Casualty Company, No. 1444 and No. 1444-A, and for Necessary Writs Pending Disposition of This Cause.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioners.

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OCTOBER TERM, 1936.

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VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

Motion for Order Restraining Respondent from Proceeding in the United States Court for the Western District of New York in the Cause Entitled United States for Use of Johnson vs. Morley Construction Company and Maryland Casualty Company, No. 1444 and No. 1444-A, and for Necessary Writs Pending Disposition of This Cause.

Now comes petitioner, Morley Construction Company, and respectfully shows that the above-entitled cause originated in the District Court of the United

States for the Western Division of the Western District of Missouri, in which respondent obtained a decree of exoneration (Rec. 37, 39) which decree directed that all the assets of Morley Construction Company be applied to the exoneration of Maryland Casualty Company, the respondent, from liability on a performance bond executed by it as sufety for said Morley Construction Company, which Morley Construction Company, on or about July 28, 1932, entered into a written contract with the United States of America and agreed to furnish all labor and material for and to fully construct and complete a veterans' hospital in or near the City of Batavia, New York, at and for the sum of $543,000.00, in accordance with the contract, plans and specifications therefor, as shown by the record in this cause in this court.

Morley Construction Company further states that on or about the 28th day of April, 1933, it entered into the contract referred to on page 2 of the petition for certiorari herein with the said Maryland Casualty Company, by which said Maryland Casualty Company agreed to deposit certain sums of money in a joint account in the M. & T. Trust Company, Buffalo, New York, that Morley Construction Company performed said alleged contract on its part, but said Maryland Casualty Company failed to deposit the money agreed by it to be deposited by it in said joint account though often requested so to do; said Morley Construction Company completed the buildings in accordance with said contract and a final settlement was made with the United States Government on the 9th day of November, 1933, after which the

United States Government, through appropriate channels, forwarded to the Morley Construction Company at Kansas City a check or voucher for $59,780.82, which voucher was deposited in Merchants Bank by the president of the said Morley Construction Company, for collection; that thereafter and on the 25th day of November, 1933, said Maryland Casualty Company filed a bill of complaint for injunction (Rec. 24) in the Supreme Court of the District of Columbia against the said Morley Construction Company and against William A. Julian, Treasurer of the United States, asking for an injunction and restraining order, and caused the said Supreme Court of the District of Columbia to issue an order to show cause (Rec. 29-30) which was served upon said Treasurer of the United States (Rec. 30), who then and thereupon refused to pay to said Morley Construction Company the amount specified in said check or voucher; that thereafter and on the 27th day of November, 1933, said Maryland Casualty Company caused the institution of the suit mentioned in the transcript of the record now on file in this court in the above-entitled cause, praying an injunction and praying for the relief of specific performance, subrogation and exoneration; that, as a result of the institution of the said suit and the restraining order and injunction issued thereon, the use of the assets of the said construction company was, by virtue of the judgments, orders and decrees of the District Court of the United States for the Western Division of the Western District of Missouri, so restricted that it was impossible for said Morley Construction Company to use said assets for any purpose other than those specified

in the decree shown at pages 37 to 39 of the record; that on a trial of said cause, the trial judge, after hearing the evidence of the witnesses for both parties, found that the Maryland Casualty Company was not entitled to the relief of specific performance or to the relief of subrogation, but found that it was entitled to the relief of exoneration (Rec. 120-125), and rendered its decree directing that the assets of said Morley Construction Company be utilized by it to pay labor and material claims on the said hospital building so erected at Batavia, New York; that at said time said Morley Construction Company had valid claims against certain subcontractors and their defaulting surety companies in excess of the sum of $42,000.00, and though said Morley Construction Company desired to use enough of its assets for the purpose of collecting said claims and compelling the subcontractors and their sureties to pay same (Rec. 112), so that said construction company could use the proceeds in discharging its obligations (Rec. 107-108), and that for said and other reasons said Morley Construction Company appealed from said decision of said district court to the United States Circuit Court of Appeals for the Eighth Circuit; that said United States Circuit Court of Appeals for the Eighth Circuit, on or about the 22d day of June, 1936, filed its opinion, a copy of which is in the transcript of the record herein (Rec. 126-138), and rendered its decree (Rec. 138-139) by virtue of which said circuit court of appeals declared that the decree of the district court awarding the relief of exoneration to the Maryland Casualty Company was erroneous, and also notwithstanding it was sustained by the law and the evidence and

though there was no appeal by respondent found that the decree of the district court denying the relief of specific performance was erroneous, and said circuit court of appeals thereupon directed that the decree of the trial court be modified in accordance with the said opinion, and, as so modified, directed an affirmance of said decree; that thereafter and in due time a petition for certiorari was filed in this court and cause, which petition was granted herein on the 12th day of October, 1936, that the said cause on certiorari is pending for argument on the docket of this court, and the counsel for petitioners have been notified that said cause will be for argument either on the 8th day of January, 1937, or early during the following week.

Said Morley Construction Company further states that on or about the 19th day of May, 1934, and about six months after said suit was filed in the District Court of the United States for the Western District of Missouri, an action by the United States, for the use and benefit of Johnson against Morley Construction Company and Maryland Casualty Company, was begun in the United States District Court for the Western District of New York based on an alleged breach of the performance bond above mentioned, wherein plaintiff asked to be paid for labor and materials furnished to said contractor in the erection and construction of said building at Batavia, New York, and that thereafter a great number of intervenors appeared in said cause in the said United States Court for the Western District of New York, praying compensation for labor and material alleged to have been furnished to said construction company; that the

contract between the Morley Construction Company and said Johnson provided that the balance for labor and materials agreed to be paid by said Morley Construction Company should not be due until the said construction company was paid by the United States Government, and that there were various other subcontractors employed by said Morley Construction Company in the erection of the said government building at Batavia, New York, whose contracts with said construction company contain similar provisions; that thereafter said Maryland Casualty Company filed a motion in said cause in the said United States Court for the Western District of New York, praying for relief as surety against Morley Construction Company; that thereafter said Morley Construction Company caused a motion to be filed in its behalf in the said United States Court for the Western District of New York in the said cause so pending in said court, wherein it alleged among other things that it was summoned into the said court to answer under the statute, to-wit, Section 270, Title 40, U. S. C., as principal in the said bond for labor and material claims, and that it was not in the said court for any other purpose, and that the said motion was duly presented to and considered by said court and was by said court sustained.

Said Morley Construction Company further states that by reason of the fact that all of its assets were in effect sequestered by the decree of the District Court of the United States for the Western Division of the Western District of Missouri, so that it could not utilize same for any purpose, said Morley Construction Company

was unable to appear in the said District Court of the United States for the Western District of New York to defend itself and present claims in its behalf in the said cause, and that the said Maryland Casualty Company, as shown by the opinions in *United States for Use and Benefit of Johnson* v. *Morley Construction Company et al.*, No. 1444-A and No. 1444, reported in the Eleventh Federal Supplement 841 and Twelfth Federal Supplement 1017, attempted to file set-offs and counterclaims in excess of the sum of $27,000.00, and that said court denied the prayer of said Maryland Casualty Company to be permitted to plead set-offs and counterclaims in the said actions, on the ground that the Morley Construction Company only could present such claims, and also upon the ground that Maryland Casualty Company was guilty of laches, and that the said Maryland Casualty Company then caused affidavits to be filed in said United States Court for the Western District of New York, setting forth that the Morley Construction Company was insolvent, and that the Maryland Casualty Company knew of said insolvency for the first time in November, 1934, notwithstanding it appears from the record herein that said Maryland Casualty Company, in its bill of complaint shown in the transcript of the record alleged insolvency of Morley Construction Company in November, 1933, and in April, 1933, and had the District Court for the Western District of Missouri find that it was insolvent on said dates.

Said Morley Construction Company further states that on or about the 14th day of December, 1936, said United States Court for the Western District of New

York rendered judgments in favor of claimants and intervenors with an opinion filed in said court and cause as shown by the attached Exhibit "A," which said Exhibit "A" is a verified copy of the opinion of said United States Court for the Western District of New York so filed on the said 14th day of December, 1936; that it appears from said opinion that said district court found that the Morley Construction Company had been paid by the United States Government (notwithstanding the record herein shows that it had not and never has been (Rec. 124)), for the reason that the United States had forwarded a voucher to said Morley Construction Company, and that the United States Government was prevented by one of the joint obligors on the bond, to-wit, the Maryland Casualty Company, from paying same, by virtue of a restraining order issued by the Supreme Court of the District of Columbia, this, notwithstanding said Maryland Casualty Company, which was actively engaged in the presentation of claims against the Morley Construction Company approximating $66,000.00, knew that no injunction or restraining order had ever been issued or made by the Supreme Court of the District of Columbia in the said suit so filed on the 25th day of November, 1933, but merely an order to the Treasurer of the United States to show cause why an injunction and restraining order should not be granted (Rec. 29-30), and that said Maryland Casualty Company knew that the Treasurer of the United States had never been enjoined or prevented from paying

the sum of $59,870.82 by any restraining order issued by the said Supreme Court of the District of Columbia; that said finding by the New York United States District Court is a result either of error, mistake or a fraud practiced on it in the act of obtaining said judgment, and the Morley Construction Company further states that it appears from said opinion of the said District Court of the United States for the Western District of New York that the United States is itself the real party in interest, in said cause as plaintiff, under the decision of this court in *United States Fidelity & Guaranty Co.* v. *United States,* 204 U. S. 349, 51 L. Ed. 516, and said United States, the plaintiff in the said action in the said District Court of the United States for the Western District of New York, breached its contract with the Morley Construction Company, in that it voluntarily refused and failed to pay the said sum mentioned in the said voucher, and that for said reason and other reasons the United States under the law could not and cannot recover against Morley Construction Company by reason of the alleged breach of said contract or bond, and for the further reason that contracts on which it sued for various subcontractors, as it appears from the opinion of said district court, provided that the amounts for balances claimed by the use plaintiff and intervenors were not due and would and could not be due until the Morley Construction Company received the money due to it from the United States.

United States to Use v. *American Surety Company*, 21 Pa. Sup. Ct. Reports 153, holds on this question:

> "No action can be sustained against the surety of a contractor under the Act of Congress of August 13, 1894, before payment has, under the terms of the contract between the parties, become due. Thus if the parties contract that the contractor shall not pay the materialman until the government has paid the contractor, the materialman cannot bring suit until the contractor has been paid, and that is the case although the bond given by the contractor to the government was conditioned that he should 'promptly make full payment to all persons supplying labor and material.'"

And said Morley Construction Company respectfully shows that it has caused a request to be made to the judge of the United States Court for the Western District of New York, who wrote said opinion, to enter an order staying all proceedings in said cause until the final disposition of this cause in this court, and suggested that the attention of said court be called to the opinion and decision of this court rendered on the 7th day of December, 1936, in the case of *James M. Landis et al.* v. *North American Co.*, No. 221.

That on this second day of January, 1937, said Morley Construction Company has been notified that said application has been passed upon in the said district court on the 29th day of December, 1936, in an opinion or memorandum proposed by said judge; said memorandum is in words and figures as follows:

United States District Court, Western District of New York. United States of America, for the Use and Benefit of Maude A. Johnson, d. b. a. Johnson's Roofing & Sheet Metal Works, Plaintiff, vs. Morley Construction Company and Maryland Casualty Company, Defendants. Law 1444-A.

APPLICATION FOR STAY OF PROCEEDINGS.

Dudley, Stowe & Sawyer, of Buffalo, N. Y., Attorneys for Defendant, Morley Construction Company.

Gibbons, Pottle & Pottle, of Buffalo, N. Y., Attorneys for Defendant, Maryland Casualty Company.

RIPPEY, *District Judge*:

The defendant, Morley Construction Company, has requested a stay of proceedings on the part of any and all parties to this action for the enforcement of any judgment entered or to be entered herein until the expiration of thirty days from the date of the order. The Maryland Casualty Company has filed objections to granting any stay. It appeared on the trial of this action that the final moneys due the Morley Construction Company had not been collected and the payment thereof had been stayed by the defendant, Maryland Casualty Company. The only reason asserted for a stay is that another action is pending on appeal in the Supreme Court of the United States undetermined, which may have a direct bearing on issues involved in the above-entitled case. There is no evidence before me that any judgments have been docketed on my decision. I can see no reason why a stay of execution or of any other proceedings herein should be granted unless the Morley Construction Company files suitable security for the pay-

ment of all judgments authorized by my decision herein. I have provided in the order which I have this day signed that proceedings for the enforcement of any judgment entered or to be entered on my decision may be stayed for a period of thirty days, upon the defendant, Morley Construction Company, depositing with the clerk of this court a sufficient sum of money to cover all judgments authorized by said decision or filing a bond to be approved by a judge of this court for one hundred twelve thousand dollars ($112,000.00).

There was no oral hearing on the application, and the order is made without prejudice for a rehearing upon the merits before Judge Knight, if the parties may be so advised.

Dated December 29, 1936.

HARLAN W. RIPPEY,
United States District Judge.

That by reason of the decree shown in the record herein (Rec. 37, 39) and the opinion and decision of the Circuit Court of Appeals for the Eighth Circuit (Rec. 126-139) the assets of said petitioner, Morley Construction Company, are not available for the purpose of depositing the sum of $112,000.00 with the clerk of said district court as required by said district court or the bond for a like sum and that said Morley Construction Company has been disabled by the said decrees shown in the record herein from furnishing the security required by the said District Court for the Western District of New York.

Said Morley Construction Company shows to this court that the decree of the Circuit Court of Appeals for the Eighth Judicial Circuit of the United States sought to be reviewed herein is erroneous, in that it directs the trial judge to enter a decree specifically performing the alleged contract referred to on page 2 of the petition for certiorari on file herein, notwithstanding said court of appeals has found that the purpose of the said contract has been accomplished (Rec. 133), and notwithstanding it appears that the Maryland Casualty Company failed to perform the said contract on its part, that the Maryland Casualty Company seeks to enforce an interest in or a claim against the United States, claiming to have been vested in it by virtue of the said contract, notwithstanding it appears (Rec. 77-78, Ex. 3) that the Maryland Casualty Company sought to make itself the owner or part owner of said claim against the United States, contrary to the provisions of Section 203, Tit. 31, U. S. C., and that, among other questions pending before this court, in this cause is the question as to whether or not the petitioner for certiorari herein, the said Morley Construction Company, shall be given the relief in this court and cause to which it is entitled, and that if the said judgment of the said United States Court for the Western District of New York be executed said Morley Construction Company will be deprived of all its assets and this said Morley Construction Company will be deprived of jurisdiction to grant the relief to which petitioner for certiorari herein is entitled and that if an order restraining the Maryland Casualty Company from enforcing the said judgment

against the Morley Construction Company be not made and if the court and judges and officials of the District Court of the United States for the Western District of New York be not prohibited from proceeding in said cause in enforcing said judgment, and if the Marshal of the United States for the Western District of Missouri be not likewise prohibited, in the event process be placed in his hands pursuant to said judgment then the jurisdiction of this court in this cause to grant the relief to which the parties in this cause are entitled will be defeated and thwarted and that the said Morley Construction Company will sustain irreparable loss, and that said Morley Construction Company has no other remedy adequate or inadequate save and except this to-wit, Section 377, Tit. 28 (U. S. C.), appeal to this court to exercise its inherent power to prevent wrong and under the statute in such case made and provided, praying this court to enter the orders and grant the writs and relief herein prayed.

Wherefore, said Morley Construction Company respectfully prays this court to make the necessary orders, judgments and decrees so as to protect the jurisdiction of this court in this cause, to dispose of the issues presented in said cause, and to award such judgment and decree as the parties herein are entitled to, and to that end to cause such orders to be made and directed to said Maryland Casualty Company and to the United States as use plaintiff in said cause so pending in the said United States Court for the Western District of New York, and to the use plaintiff and intervenors

therein, and to the said District Court of the United States for the Western District of New York, and the judges and officials thereof, as may be necessary to protect the jurisdiction of this court, and to order and direct that said Maryland Casualty Company, said United States, and said use plaintiff and intervenors, and the said district judges and the said District Court of the United States for the Western District of New York, proceed no further in said cause so pending in the said United States District Court of New York until the further order of this court, and to issue such writs as may be necessary to give effect to the said orders, including writs of prohibition, mandamus, certiorari, and such other writs and process as may be lawful, just and proper.

And said Morley Construction Company respectfully prays for such other and further relief in the premises as to this court may seem proper.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioner, Morley Construction Company.

State of Missouri, County of Jackson, ss.

Herbert F. Morley, of lawful age, being duly sworn, upon oath states that he has read the above and foregoing motion, that he knows of the matters and things therein contained, and the said affiant states that in so far as said affiant knows of said matters he states that said matters are true, and that in so far as it appears from the said motion that the said affiant knows of the

same upon information and belief said affiant states that he believes that all of the said matters set forth in the said motion are true. And further affiant saith not.

.....

Subscribed and sworn to before me this 1st day of January, 1937.

My commission will expire the .... day of ....., 193..

....,

Notary Public, Jackson County, Missouri.

SUGGESTIONS IN SUPPORT OF FOREGOING MOTION.

It appears from the motion that the proceedings sought to be stayed herein, if continued, will deprive this court of jurisdiction to grant the relief sought for herein, in that it will enable the Maryland Casualty Company and other claimants to take the assets of the Morley Construction Company, notwithstanding the said Morley Construction Company has been prevented by the wrongful acts of the said Maryland Casualty Company, in violation of its contract of suretyship, and in breach thereof, to control the right of the said construction company to transact its business in its own way and to do so before the liability of the said Maryland Casualty Company as surety had accrued and before the United States had any right to sue said Maryland Casualty Company. Said Morley Construction Company respectfully directs attention to the petition for certiorari on file herein and to the brief in support thereof, and also calls attention to Section 377, Title 28, U. S. C., providing:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specified and provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeably to the usages and principles of law."

Also to opinion in *Toledo* v. *Computing Co.*, 261 U. S. 399, l. c. 426, holding that under this section a fed-

eral appellate court had the right to issue all writs not specifically provided for by statute which might be necessary for the exercise of its appellate jurisdiction. In that case this court held that the circuit court of appeals was justified in enjoining a litigant before it from prosecuting a suit or action which interfered with the jurisdiction of the appellate court. See, also, *Ex parte Milwaukee R. Co.*, 5 Wall. 188.

We also respectfully submit that the principles stated in the opinion of this court in *Landis* v. *North American Co.*, No. 221, on December 7, 1936, are applicable, and justify this application.

Respectfully submitted,

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioners.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 325.

MORLEY CONSTRUCTION COMPANY, A CORPORATION, AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, A CORPORATION,
PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, A CORPORATON, RESPONDENT.

NOTICE.

To the Above-Named Maryland Casualty Company and Its Attorneys of Record:

You will please take notice that the attached motion will be presented to the Supreme Court of the United States on the 4th day of January, 1937, for hearing and determination.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioners.

Received copy this ... day of January, 1937.

.....,
Attorneys for Respondent, Maryland Casualty Company.

EXHIBIT "A."

United States District Court, Western District of New York. United States of America, for the use and benefit of Maude A. Johnson, d. b. a. Johnson's Roofing & Sheet Metal Works, Plaintiff, vs. Morley Construction Company and Maryland Casualty Company, Defendants. Law 1444-A.

APPEARANCES.

Buchholz & O'Donnell, of Kansas City, Mo., and Dudley, Stowe & Sawyer, of Buffalo, N. Y., by Roy P. Ohlin, of Counsel, Attorneys for Defendant Morley Construction Company;

Gibbons, Pottle & Pottle, of Buffalo, N. Y., by Frank Gibbons, of Counsel, Attorneys for Defendant Maryland Casualty Company; also for Maryland Casualty Company as assignee of various claimants;

McKay & Headley of Rochester, N. Y., by Clarence W. McKay, of Counsel, for twenty-seven claimants;

Lansdowne & Lansdowne, of Buffalo, N. Y., by Robert J. Lansdowne, of Counsel, for Earl L. Harrington, as Administrator with the will annexed of the Estate of Moody L. Rupp, deceased;

Kenefick, Cooke, Mitchell, Bass & Letchworth, of Buffalo, N. Y., by William P. Stewart, of Counsel, for the Standard Accident Insurance Company;

John Marshall German, Buffalo, N. Y., for J. S. Thorn Company;

Kennedy, Holland, DeLacy & Svebeda, and Edwin J. Cullifan, of Counsel, Buffalo, N. Y., for Concrete Engineering Company; also Yale C. Holland, of Counsel, for Concrete Engineering Company;

Stanley R. Montfort, of Buffalo, N. Y., for Concrete Engineering Company;

James F. Kelly, of Buffalo, N. Y.; for Maryland Casualty Company;

George Cashwa, of Baltimore, Md., for Maryland Casualty Company.

RIPPEY, *District Judge*:

The general contract of construction between the Government and the Morley Construction Company is dated July 23, 1932. Article 1 reads as follows:

> "Article I. STATEMENT OF WORK.—The contractor shall furnish all labor and materials, and perform all work required for constructing and finishing complete, at Veterans' Administration Hospital, Batavia, New York, Main Bldg. #1, Dining Hall and Attendants' Quarters Bldg. #2, Recreation Bldg. #4, Nurses' Quarters Bldg. #5, M. O. Q. Residence Bldg. #6, two officers' duplex Quarters Bldgs. Res. 7 and 8, Laundry Bldg. #9, Storehouse Bldg. #10, Boiler House Bldg. #12, Garage Bldg. #13, Flagpole #14, Incinerator Bldg. #15, Sewage Pump House #17, Connecting Corridors Nos. 1-2 and 1-4, providing slate as specified under 'Roofing and Sheet Metal,' Section 210, in lieu of shingle tile where shown on drawings, and providing tile wainscot 7'-0" high (including plastered walls and partitions above the wainscot) and quarry tile base as specified, in Dining Hall and Attendants' Quarters Bldg. #2 and Nurses' Quarters Bldg. #5 in lieu of enam-

eled blocks and base; also Roads, Walks, Grading and Drainage in connection with these buildings, but not including Plumbing, Heating, Electrical Work and Outside Distribution Systems, Electric Elevators, Steel Water Tank and Tower, Refrigerating and Ice Making Plant and Zoolite Water Softening System, for the consideration of Five Hundred Forty Thousand Three Hundred Dollars ($540,300.00) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications for Buildings and Utilities for Veterans' Administration Hospital at Batavia, New York, June 3, 1932, and the schedules and drawings mentioned therein; Addenda No. 1 dated June 28, 1932 and No. 2 dated July 1, 1932; as contemplated by Item I and Alternates (a), (b), (d-b), (d-c) and (e) of the Contractor's proposal dated July 9, 1932; the Contractor's telegram dated July 12, 1932, and letter of acceptance dated July 23, 1932.

"The work shall be commenced within Ten (10) Calendar Days after date of receipt of notice to proceed, and shall be completed within Two Hundred Forty (240) Calendar Days after date of receipt of notice to proceed, except that Storehouse Building No. 10, Radial Brick Chimney, pipe tunnel and sufficient work in Boiler House Building No. 11 to permit the installation of boilers and equipment will be completed 90 days prior thereto."

Article 4 authorizes the Government to make necessary changes in drawings and/or specifications with increase or decrease of cost and/or difference in time in the event that subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications are encountered during the progress of the work.

Article 5, with reference to extras, reads as follows:

> "Article 5. EXTRAS.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

Article 6 (and provisions elsewhere in the contract) makes the Government the sole judge as to whether workmanship and materials are such as are required by the contract and as to whether work is performed as required by the contract, and in the event of rejected workmanship or material or faulty or improper construction the contractor is required to correct the work, replace rejected material, or make changes as directed, and segregate and remove rejected or replaced material at his own cost.

Under Article 6 the contractor is required not only to give his personal superintendence to the work but to have a competent superintendent, satisfactory to the Government, on the work at all times during the progress of the work, with authority to act for him.

Article 15, with reference to disputes, reads as follows:

> "Article 15. DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the

contractor shall diligently proceed with the work as directed."

Payments under the contract were provided for in Article 16. Partial payments were to be made as the work progressed at the end of each calendar month on estimates made and approved by the contracting officer less 10 per cent on the estimated amount until final completion and acceptance of the work covered by the contract, except that any time after 50 per cent of the work had been completed the Government might, if it saw fit, make any of the remaining partial payments in full. The final payment was to be made after completion and acceptance of all work required upon the presentation of a properly executed and duly certified voucher, after the contractor shall have furnished the Government with a release, if required, and after taking into consideration allowable deductions.

Ten Change Orders were made by the Government during the progress of the work, as authorized by the terms of the contract. These orders involve a decrease in the contract price of $403.16 and an increase of $3,579.19, thus leaving the total contract price for the entire work at $543,476.03. Change Order "E" under date of May 5, 1933, made a change on account of rock excavation discovered necessary during th progress of the work and contemplated and authorized by Section 2(c) of the Standard Specifications for Earthwork of $89.10, increase on account of deep footing and trench excavation by hand, 8.10 cubic yards at $11.00 per cubic yard, and power shovel excavation of 226.45 cubic yards at $9.00 a

cubic yard, amounting to $2,038.05, making a total increase in contract price of $2,127.15 on account of this item. Change Order "I" provided for an increase of $112.32, under date of September 16, 1935, on account of 12.48 cubic yards of rock excavation at $9.00 per cubic yard, in accordance with an agreement between the contractor and the Government under date of September 5, 1933.

On May 5, 1933, forty days additional time were granted by the Government to complete the contract on account of the additional work required as specified in Change Order "E" above mentioned, and on May 8, 1933, because of Change Order "F" requiring reconstruction of the foundations of the Pump House in a new location in accordance with revised contract drawings and including additional cribbing and concrete and because of encountering quicksand an additional time of twenty-five days was allowed for completion of the work, the contractor being allowed an additional sum of $995.45 for the work included in the above totals. The Government did not terminate the previous extension for an additional twenty days. Notice to proceed was given to Morley on August 19, 1932. With the extensions granted, the contractor had 325 calendar days within which to complete the work. This time expired July 19, 1933. The work was not completed until October 31, 1933.

The Government accepted the work as finally completed and approved final settlement on November 9, 1933, and the amount was audited and a check for final payment was issued to Morley on November 13, 1933, in the sum of $59,780.22. The Morley Company was unable to

cash the check because the Government was restrained from paying the check on suit of the surety. No release was given by Morley as contemplated under the provisions of Article 16(d) of the contract and none was required. Article 9 of the contract provided for damages for delay or failure to complete the contract within the time specified, but no such damages were exacted by the Government under that clause.

Under the provisions of Article 8, Herbert F. Morley, President of the contractor, gave his personal superintendence to the work. The contractor also provided a competent superintendent by the name of Reimer, who was satisfactory to the Government and who had full authority to act for the Morley Construction Company and to bind it by any agreement made or act performed by him.

The Morley Construction Company executed and delivered its performance bond on or about August 1, 1932, in the penal sum of $275,000.00 with the Maryland Casualty Company of Baltimore, Maryland, as surety. Attached to and made a part of the bond was the contract above referred to. The defeasance clause of the bond reads as follows:

> "Now therefore, if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, con-

ditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the Act of August 13, 1894, as amended by Act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then this obligation to be void; otherwise to remain in full force and virtue."

The defendant Morley Construction Company filed an answer to the petition and put in a general denial as to some of the intervening petitions, but defaulted in pleading as to others, including the petitions of the labor claimants. Upon the trial it moved to dismiss the bill of complaint and all claims of intervenors on the grounds (1) that the court was without jurisdiction of the suit in that it was prematurely brought because "final payment" of the amount due the Morley Company had not been made by the Government, (2) that there was nothing due Maude A. Johnson from the contractor at the time suit was brought, (3) that, inasmuch as the bill of complaint must be dismissed on the ground first above mentioned, all claims of intervenors must fail, (4) that nothing was due the intervening claimants when suit was brought or when their claims were filed, (5) that the plaintiff and certain of the intervening claimants were paid the amount of their claims by the surety before the trial and the surety may not recover in this action against the contractor either under the doctrine of subrogation

or by virtue of assignments of their claims, and (6) that neither the plaintiff nor any of the intervenors have established facts sufficient to constitute a cause of action. Except as to the claimants whose claims have been assigned to the surety, the surety joins in the motion to dismiss on grounds numbered (1), (2), (3), (4) and (6) above.

The action was begun on May 19, 1934, by Maude A. Johnson, doing business as Johnson Roofing and Sheet Metal Works, against the contractor and surety on the bond under the Heard Act (40 U. S. C. A. 270). The plaintiff was a subcontractor. The contract between her and Morley provided that she should receive payment only as and when the Morley Company received its pay from the Government for work done and materials furnished by her. There was a similar provision in the contracts between Morley and other subcontractors as to the time when payment was due to the latter. The statute authorizes a cause of action in the form in which this one is brought in favor of subcontractors, laborers, and materialmen, and the time within which they must bring suit is limited by the statute to one year after the completion of the work and "final settlement" of the contract, but it may not be brought within the first six months of such period, which is reserved to the United States to sue on its own account. When one action has been brought, all other creditors must intervene therein within the same time limit (*United States* v. *Rangely Construction Co.*, 288 Fed. 76) if they are to recover on the bond. The date of "final settlement" starts the statute running without regard to the date when the work

was completed (*United States* v. *Fleischmann Constr. Co.*, 298 Fed. 320, aff'd 298 Fed. 330, aff'd 270 U. S. 349). The term "final settlement," as used in the statute, denotes the date of final administrative determination by the proper authority of the amount due, without reference to when final payment is made (*Illinois Surety Co.* v. *Peeler*, 240 U. S. 214; *H. G. Christman Co.* v. *Michigan Gypsum Co.*, 85 F. (2d) 474). Thus, "final settlement" in the case at bar was on November 13, 1933, as appears from the voucher duly audited for final settlement. The action was thus brought within the period required by the statute.

It is true, if the action had been brought before the expiration of the six-month period reserved to the Government to sue on its own account or after the expiration of the one-year limitation, the court would be without jurisdiction to entertain the suit; in such a case, an amendment to the complaint would not cure the lack of jurisdiction; nor could the suit be maintained in behalf of intervenors even though their intervention occurred after the end of the first six months of the statutory limitation of time and before its end (*Texas Cement Co.* v. *McCord*, 233 U. S. 157). Under such circumstances, lack of jurisdiction depends solely upon the fact that the action was not brought within the time authorized by the statute. Here no such question arises. Summons was duly issued by the clerk of this court, dated May 19, 1934, and served on the defendant, Morley Construction Company, by a United States Marshal at Kansas City, Missouri, on May 28, 1934. The surety was served and all claimants intervened within the period

of statutory limitation. The action was brought in time and the court acquired jurisdiction of the parties. The court also has jurisdiction of the subject matter. The contract was performed within the Western District of New York. The suit is not for the balance unpaid on the contract. There is no fund in court. It is an action on the bond, and the territory of the entire United States and its possessions is, by statute, within the jurisdiction of this court to make its process effective (*United States* v. *Congress Construction Co.*, 222 U. S. 199; *Baker Construction Co.* v. *United States,* 204 Fed. 390). Having jurisdiction of the parties and the subject matter in accordance with the statutory provisions (40 U. S. C. A. 270), the court may render such judgment as to all parties involved as the merits demand. Purchase of the claims of plaintiff and intervenors by the surety after the action was duly commenced did not deprive the court of jurisdiction (*Seaboard Surety Co.* v. *United States,* 84 Fed. (2d) 348, 350).

Neither the contractor nor the surety can succeed on their claim that nothing was due to the plaintiff or to other intervening subcontractors from the contractor at the time the suit was commenced on the ground that the Morley Company has not, in fact, received its pay from the Government. The fact that the final payment has not been made by the Treasurer of the United States to Morley is no fault of the Government nor of the plaintiff nor of the intervenors. The check was duly issued to Morley by the Treasurer of the United States and accepted as final payment by Morley. He deposited it for collection in the Merchants Bank of Kansas City on

November 22, 1933. The only reason it has not been cashed is that, upon application of the defendant surety, the Treasurer of the United States has been restrained by the court from paying the amount to Morley. If creditors are to be held up by a quarrel (real or feigned) between the contractor and the surety on the question of which shall get the money, they may be forever barred from recovery. The Government was bound to pay the final amount due on the contract from November 13, 1933, and was and is willing to pay and attempted to do so.

The Morley Company claims, as above indicated, that the surety may not have judgment against it on account of claims of intervenors assigned to it during the pendency of this action. It cannot base this ground for dismissal on the ground of payment. Payment is an affirmative defense and must be pleaded (*Kalloch* v. *Hoagland,* 239 Fed. 252). The contractor has not pleaded payment. It cannot otherwise successfully maintain this claim. The surety is entitled, under the doctrine of subrogation, to recover against the Morley Construction Company for any moneys it may have paid to the subcontractors, laborers and materialmen under compulsion (*Aetna Life Insurance Co.* v. *Middleport,* 124 U. S. 534; 60 C. J. 740, 744). There are at least thirty of such payments, exclusive of those that the surety may later be required to pay at the end of this litigation. The surety does not rely on the doctrine of subrogation, however. If that doctrine were invoked, it might be held that the litigating claimants have superior equities (*Jenkins* v. *National Surety Co.,* 277 U. S. 258, 266), or

that the decision of Judge Knight (later referred to) is controlling. It relies, as to those payments already made, on assignments of claims secured during the pendency of this action. Under its bond, the surety is liable up to the sum of $275,000. If all claims should be allowed herein, the total is less than the amount for which the surety is liable. The claims in question were assignable during the pendency of the action (N. Y. C. P. A., Sec. 83; *Fifth National Bank* v. *Woolsey,* 31 App. Div. 61, 66; *Perry* v. *Levenson,* 178 N. Y. 559; *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works,* 163 Fed. 168, aff'd 219 U. S. 24) and may be prosecuted either in the name of the assignee or the assignor, and no valid reason exists why the surety defendant may not recover against the contractor, if the assignors are entitled to recover. The assignment did not affect the remedy (*United States* v. *Rundle,* 100 Fed. 400; approved in *Title Guaranty & Trust Co.* v. *Crane Co.,* 219 U. S. 24, 35). Such judgments cannot affect the amount of recovery by those litigating claimants who have not assigned their claims. The practical effect is to liquidate all claims involved in this suit, and pro-rating is neither necessary nor permissible. The assertion that the Act does not in terms give any right to the surety to maintain an action against the contractor is not decisive of the right of the surety to have judgment in this action on the assigned claims. Certainly, if the facts warranted, the assignors could recover. If necessary to satisfy legal niceties, such judgments might be docketed by the surety in the names of the assignors. It would seem to reach the height of absurdity to say that as-

signees (other than the surety) might recover, while no recovery may be had on the claims, no matter how meritorious, solely because they have been assigned to the surety. The recovery in any event is on the bond. In any event the contractor is liable over to the surety. The insolvency of the contractor might otherwise preclude the surety from recovering anything at all.

The Morley Construction Company attempted to appear specially on the trial to insist that the right of the surety to recover against it has already been determined in this case. On April 3, 1935, the Maryland Casualty Company served a complaint on the Morley Construction Company in which it demanded damages "for all loss and expenses incident to the obligation which rests upon the Maryland Casualty Company by reason of its bond or undertaking and for judgment against the Morley Construction Company, for the amount of all claims or demands, judgments or obligations found to rest upon it, together with all sums heretofore paid out by it by reason of its said obligation, and the amount of all expenses of the nature hereinbefore described which shall have been incurred by the said defendant Maryland Casualty Company." The Morley Construction Company appeared specially for the purpose of moving to strike out the pleading and to dismiss the alleged cause of action, and an order was entered by Judge Knight on December 6, 1935, striking out the complaint. The opinion of Judge Knight indicates that the complaint was stricken out on the ground that the surety could not bring an action against the principal under the provisions of the Heard Act. In so far as that cause

of action is concerned, the decision of Judge Knight is the law of this case.

The defendant Morley Construction Company appeared generally and filed an answer on June 23, 1934, in which it admitted the allegations contained in Paragraphs 1, 2, 3, 4 and 5 of the bill of complaint of Maude A. Johnson, but denied each and every other allegation of the complaint. Intervenors were required only to file their petitions in due course; they were not required to serve other original process to recover against either of the defendants (*Texas Cement Co.* v. *McCord*, 233 U. S. 157; *McClamroch* v. *Southern Surety Co.*, 103 Iowa 249, 187 N. W. 41). As to certain of the intervenors who have assigned their causes of action to the Maryland Casualty Company, the Morley Construction Company also appeared generally and filed answers to the petitions of intervention. Judge Knight did not pass upon the question raised upon the trial by the Maryland Casualty Company that it is entitled to judgment on the intervening petitions based upon the assignments. That question is in no wise affected by Judge Knight's decision. The objection of the Morley Construction Company to proof of claims of intervenors at the trial and to the effect that recovery may not be had against it by the plaintiff or by the intervenors must be overruled.

Standard government specifications were used for the purpose of bidding and for all purposes of the contract, made up by the Veterans' Administration Construction Service and approved by the President as of November 19, 1926. The contract, in the case at bar, provides that the contractor shall furnish all labor and

materials and perform all work as required for the construction and finishing complete at the Veterans' Administration Hospital, Batavia, New York of all the work required "in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications for Buildings and Utilities for Veterans' Administration Hospital at Batavia, New York, June 3, 1932, and the schedules and drawings mentioned therein." The performance bond was in standard form and refers specifically to the contract and is conditioned for the payment by the contractor upon the performance and fulfillment of all the undertakings, covenants, terms, conditions and agreements of the contract. There can be no question but that the specifications, in so far as applicable, were a part of the contract for the faithful performance of which the bond was given.

Paragraph 16 of the specifications provides that the rate of wages for all laborers and mechanics employed by the contractor or any subcontractor on the buildings covered by the contract should be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the state in which the public building is located, and that every person while performing work of a laborer or mechanic on the public work covered by the contract should be regarded as employed as a laborer or mechanic by the contractor or subcontractor, regardless of any contractual relationship alleged to exist between the contractor or subcontractor and such laborer or mechanic.

It is, of course, clear that the foregoing provision of the contract with reference to laborers is of no weight unless authorized by Congress, and at the outset the contractor and the surety claim that Congress had not authorized the insertion of any such clause in the contract. The act of March 3, 1925, relating to the construction of new hospitals or dispensaries (43 Stat. 1213, 38 U. S. C. A. 436), provides that such construction shall be done in such manner as the President may determine. The act of March 3, 1931 (46 Stat. 1494, 40 U. S. C. A. 276a), in effect at the time the contract of the case at bar was executed, provides that every contract in excess of $3,000 in amount, to which the United States is a party, which requires or involves the employment of laborers or mechanics in the construction, alteration and/or repair of any public buildings of the United States shall contain a provision to the effect that the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the state in which the public buildings are located, and a further provision that in case any dispute arises as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which can not be adjusted by the contracting officer, the matter should be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract. On January 19, 1932, in order to effect the purposes of the foregoing

acts, an executive order was issued by the President requiring that all contracts within the terms of the said act should contain a stipulation required thereby. There can scarcely be any question that the clause in the contract relating to the payment of the prevailing rate of wage was inserted therein by the authority and requirements of the acts of Congress above referred to.

On September 22, 1932, the Director of Construction wrote the contractor fixing the wages of the various classes of laborers to be employed in the work to be performed under the contract as the prevailing rates at Batavia, New York, and directed that in accordance with the provisions of its contract, based upon the act of March 3, 1931 and the executive order of January 19, 1932, it see that the wages paid by it or its subcontractors on the project were not less than these listed, and that it post those wage rates in a prominent and easily accessible place at the site of the work so that such list might be seen at any time by persons engaged on the work. The contractor duly posted the rates specified. The Secretary of Labor, on October 14, 1932, adopted the rates fixed by the Director of Construction as the prevailing rates for Batavia, New York, and directed him to forthwith notify the Morley Construction Company to put those rates into effect without further delay. Such a notice was received by the contractor. The contractor complied with the order and posted the rates as directed.

On November 28, 1932, the Morley Construction Company entered into a contract with D. Giamberardino & Son for the furnishing and payment by the subcontractor of all labor as called for on the plans and

specifications, of which the contract of the Government was made a part. The subcontract provided for supervision by the contractor to see that the wages were paid in accordance with its terms and for severe penalties for failure of the subcontractor to comply.

At or about the time or later, the subcontractor employed the various laborers who are now making claims in this action, and they worked for varying periods on the job but never received the prevailing rates as fixed by the Secretary of Labor and posted by the contractor. These claimants variously testified that the subcontractor, at the time of their respective employments, agreed to pay them the prevailing rate of wage as posted. The defendants, on the other hand, introduced evidence to indicate that the men were not employed at the job but, rather, at the subcontractor's place of business in Rochester, New York, and that the subcontractor advised the men that he would be unwilling to take the contract at the prevailing rate of wage and that they agreed to go to work at a lower rate. The subcontractor asserts that he took his contract on the basis of that understanding with the laborers and made a bid much lower than he could otherwise have made. Upon the whole record, it must be held that there was no agreement between the contractor and these laborers at the time they went to work that they should receive the specified prevailing rates. The evidence also discloses that the contractor was aware of the fact that there was no such agreement made and acquiesced in it prior to the time that the subcontract was let. All the

laborers understood, however, after they went to work, that they were to receive the rate of wages as posted.

There came a time in January, 1933, when these laborers signed a statement to the effect that they had received their pay in full for all of their work during a period between December 9, 1932, and January 14, 1933; another statement was signed by them indicating that they had received their pay for the period from January 14, 1933, to February 11, 1933, in full for all work performed; a third statement was signed by them indicating that they had received their full pay for the period from February 11, 1933, to March 9, 1933. The men testified variously that these papers when signed were blank papers, that the papers were folded in such a way that they did not see them in their entirety, and that it was represented to them by the subcontractor that it was necessary for them to sign in order to show that they were American citizens. The excuse that was furnished that they were induced to sign the papers so as to show that they were American citizens is unworthy of credit. There was credible evidence to the effect that the statements in the papers over the signature of these men were on the papers at the time the signatures were made, and it must be so held. They were advised and knew that the papers were to be shown to the Morley Construction Company to enable the subcontractor to secure moneys from the contractor. The conditions under which a signer of a written instrument is bound by its terms are succinctly stated in *Pimpinello* v. *Swift & Company*, 253 N. Y. 150, where it is said:

> "Ordinarily, the signer of a deed or other instrument, expressive of a jural act, is conclusively bound thereby. That his mind never gave assent to the terms expressed is not material. * * * If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case the writing binds him, * * * If the signer is illiterate, or blind, or ignorant of the alien language of the writing, and the contents thereof are misread or misrepresented to him by the other party, or even by a stranger, unless the signer be negligent, the writing is void."

No inference is warrantable that they did not know what they were signing or what the purpose was for securing their signatures. None by Van Duser and Karcus Boasignore objected to the failure of the subcontractor to pay the prevailing rates until the strike on or about April 11, 1933, and so claim is made by any of them for work after that date. No reason appears why they should not be bound by these statements and the defendants relieved from any further payments for the periods covered thereby, unless they are protected by the terms of the contract and the action of the Secretary of Labor, or the defendants are not in a position otherwise to bar the claimants from recovery.

On April 14, 1933, the same claimants executed another paper, and it must be held upon the whole record that they knew what they were signing at the time. In that, they certified that they had been paid in full for all work performed by them at the prevailing wage scale of $1.25 per hour for the plasterers, fifty cents per hour for the hod carriers and forty cents per hour for

the laborers, and they specifically released both the contractor and the subcontractor from any and all claims which they had or might have on account thereof.

About that time a labor union made an investigation and called a strike, as a result of which the Department of Labor made an investigation and directed the contractor and subcontractor to pay the difference between what had been paid and the prevailing rates as posted to all those who had not signed the foregoing instruments. The defendant surety company asserts that, on the strength of the instruments signed by the claimants and to avoid further strike and the imposition of a possible penalty by the contracting officer, it advanced something over five thousand dollars with which to make such back payments.

We thus have these wage claims by laborers who (1) receipted in full for all amounts due and (2) released the subcontractor and contractor for any of such claims, and (3) received amounts actually paid without complaint, notwithstanding that they did not receive the amount of pay provided for in the contract or at the rates posted at the site, or which they understood they were to get. May they now, as a matter of law, have judgment for the difference between the amount provided for in the contract and the amount they received?

There is no provision in the contract, the subcontract, the statute, or the executive order that makes an agreement between an employee and the employer void if it provides for less than the prevailing rate. This is so notwithstanding the claim of the intervenors that paragraph 16 of the specifications provides that every

person employed shall be deemed to be a laborer or mechanic within the meaning of the contract, any agreement to the contrary notwithstanding. That provision prohibits a subterfuge, as by calling an employee a "waterboy" or something else other than a laborer or mechanic. It did not make void a contract with a laborer or mechanic for less than the prevailing rate. Even if it were otherwise, Congress never authorized the making of a contract void under such circumstances. Congress might have done so (*Atkin* v. *Kansas*, 191 U. S. 207), as it did do in 1935. Had Congress intended to make a contract void which provided for a rate of wage lower than the prevailing rate, it would have done so in express terms. The fact that it did make a contract for less than the prevailing rate void by the amendment of 1935 (49 Stat. 1012, 40 U. S. C. A. 276a(2)(b)) is persuasive on the intended scope of the 1931 act. In view of the state of the law at the time of the enactment, the laborers who signed the receipts and the release might have waived their right to the prevailing rate (*Ryan* v. *City of New York*, 177 N. Y. 271; *People ex rel. McLaughlin* v. *Police Commissioners*, 174 N. Y. 450; *Clark* v. *State*, 142 N. Y. 101; *Wright* v. *State of New York*, 223 N. Y. 44; *Byrnes* v. *City of New York*, 150 App. Div. 338; *Pitt* v. *Board of Education*, 216 N. Y. 304). But here the Government, for purposes of its own and as a matter of public policy, within its rights as above indicated, saw fit to require as one of the conditions of the contract, the payment of the prevailing rate of wage, as conclusively fixed by one of its agencies. It is now, as the real plaintiff in this case (*U. S. Fidelity Co.* v.

Kenyon, 204 U. S. 349) suing to enforce that contract, the provisions of which it has not waived. It is immaterial that the laborers are benefited by being permitted to recover unpaid wages at the prevailing rate. To deny this would be to allow individuals to nullify what Congress has deemed advisable in order to permit the United States when entering building contracts to attract competent and sufficient laborers and materialmen to carry on the work expeditiously.

The rights of the laborers to receive the prevailing rate of wages were joined inseparably to the Government's rights under these provisions. The waiver by the laborers of the benefits they were entitled to did not relieve the contractor and the surety of the duty to perform, and it is immaterial with respect to the defendants in this action who receives the benefits of their performance, and consequently, they cannot avail themselves of the defense of waiver unless they can show waiver on the part of all who were entitled to have the contract performed.

There are additional grounds why the surety cannot bar the labor claimants from recovery. The surety stands in no better position with reference to its defenses than the contractor (*United States* v. *National Surety Co.*, 20 F. (2d) 972, 975). Surely the contractor could not absolve itself from liability on the ground of payment or estoppel or waiver. The claimants were not paid the amounts they were entitled to receive. Both the principal and the surety knew that to be a fact. The statute, the executive order, and the contract required

payment of the prevailing rate of wage which had been conclusively fixed by the Secretary of Labor before the men went to work. As a fact, concededly, this was not paid. The claimants cannot be barred from asserting their claims on the basis of estoppel. The defense of estoppel is based on the proposition that a party may be precluded by his acts or conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it. Estoppel bars assertion of the truth by one who has knowingly induced another to believe what is untrue and to act accordingly. The evidence in this case establishes beyond doubt that the statements in the receipts and release were untrue and that the Casualty Company, as well as the principal, knew that the statements were untrue. It was fully familiar with the proceedings at the time of the strike and was advancing its moneys for the very purpose of enabling the Morley Company to pay the laborers who had not signed releases the difference between the amount they received for their work and the prevailing rate. The surety company knew that the claimants here were then making the identical claim that was made by the laborers who received this difference, to-wit: that they had not been paid in full at the prevailing rate. It knew that the only reason the Labor Department did not compel the contractor to pay to these claimants that difference was because of the release. Neither of the defendants was misled to its prejudice or into any altered position by virtue of the alleged release, and they were bound to know that they were not relieved from paying

the prevailing rate of wage. They did not advance the money to pay the other laborers on the strength of the receipts and releases of the claimants here. The advance was made to settle the strike and enable the contractor to go on with the work. Neither was there any waiver by claimants of their rights. The Morley Company is in default in pleading and the surety company has not pleaded waiver. Waiver is an affirmative defense and must be pleaded (*Oswego Falls Corporation* v. *City of Fulton,* 148 Misc. (N. Y.) 170, 179). Neither can the surety reduce the amount of the claims on the ground that the prevailing rate of wages for work of a similar nature in Batavia, New York, where the buildings were constructed, was lower than the rate fixed by the Secretary of Labor. The contract and statute provide that the rate fixed by the Secretary of Labor shall be conclusive, and a most persuasive fact is found in the acknowledgment by the contractor before the laborers went to work of the right of the Government to fix the rate of wage to be paid under the contract and in its acquiescence in the rate so fixed.

It follows that claims made by the laborers as proven upon the trial in the aggregate face amount of $4,703.06, with interest, must be allowed, and their motions for direction of verdict as to the several amounts proven must be granted, and the motions of the defendants for a direction of verdict in their behalf must be denied.

The Concrete Engineering Company had two contracts with the Morley Construction Company, the first to furnish and to deliver to the job all steel window equipment complete, as called for under articles 18CA-1

to 18CA-13, inclusive, of the specifications, including amendments to 18CA, for the sum of $12,295.60 (including extras), and the second to provide the reinforcing steel and all labor and materials necessary to place and remove all removable steel forms for all joist forms required where open centering is used, for $27,548.63 (including extras). All materials required by both contracts were furnished. On the first contract there was paid or credited $8,165.06, leaving a balance due of $4,130.44. On the second contract there was paid or credited $23,698.35, leaving a balance claimed to be due of $3,850.25. Defendants claimed damages for delay in performance of the first contract. Defendants did not substantiate their claim, however, and could not recover, anyway, under the pleadings. The amount claimed must be allowed. This contract was sublet to the J. S. Thorn Company. On the second contract, the defendants claim they should have an allowance of $973.80 for damage to the concrete through the use of defective forms furnished by claimant. The written contract was not delivered until the work was substantially completed. It was drawn by the claimant and executed by it on August 1, 1933, and then delivered to Morley. The latter held it until December 10th, when it was returned to claimant without change, except as to items mentioned in the letter dated December 10, 1933, accompanying the contract, which provides that Morley will expect claimant to pay the expense of patching concrete required after removal of the forms. The claimant went ahead with his work, furnished the forms, and they were finally accepted and approved by the contractor and by the Government representative

and were used to the exclusion of any others in the progress of the work, on the assumption that the contract would be signed by Morley. I am satisfied that the minds of the parties met on the terms of the written contract and that it embodied the entire agreement between the parties. When the forms were removed, the concrete was left badly honeycombed and rough, so that an extensive amount of refinishing by Morley was required. I am also satisfied that the evidence satisfactorily establishes that the honeycombing or roughing of the cement was not due to defective forms but was due to the character of the concrete mixture used by Morley and the removal of the forms before the concrete was thoroughly set, or improper tamping. Complaint was made when the forms were delivered that they were dirty, had hardened spots of concrete attached to them, were bent and dented, and were not greased. Thereupon they were cleaned by claimant and put in proper condition for use. However that may be, the forms furnished were inspected, after cleaning, by the representative of the Government and approved and used by Morley prior to his delivery of the contract to claimant, and defendants are not now in a position to assert that there was any more honeycombing and roughing of the cement shown after the forms were removed than would ordinarily show with the quality of the mixture used or to assert that the forms provided were not according to the contract. The claim for an allowance has not been sustained. If the forms were rough or pitted or otherwise defective as claimed, objection should have been made before they were used.

It is too late to make that objection for the first time after the contractor has had the benefit of their use.

On August 16, 1932, a contract was entered into between the Morley Construction Company and the States Steel Construction Company whereby the latter agreed to furnish labor and material necessary in connection with the placing and installing of the reinforcing steel in the hospital building for $4,000. The subcontractor failed to perform, and the Standard Accident Insurance Company, who was surety on their bond, took over and fully completed the work, and claim is made for $4,227.60, the contract price plus extras, on which had been paid $3,128. The claimant was unable to prove on the trial, however, that there was a balance of more than $900 due. That amount was admitted to be due. On October 8, 1932, for value received, the subcontractor duly assigned this claim to the Standard Accident Insurance Company. The assignment was introduced in evidence and is absolute upon its face, and it appears that $1200 was paid by the assignee to the assignor. The claim was assignable and the assignee may recover (*Title Guaranty & Trust Co.* v. *Puget Sound Engine Works,* 163 Fed. 168, aff'd 219 U. S. 24). The counterclaim was stricken out of the answer by Judge Knight on motion before the case came on for trial, and his decision on that question is the law of this case. The motion to dismiss because of the alleged variance between the pleading and proof must be denied. The variance is not material, but, if it were to be held material, the complaint must be deemed amended to conform to the proof.

The intervening petitions and claims of (1) Appalachian Marble Company, (2) M. N. Cartier & Sons Company, (3) Columbia Brass Co., (4) Cotta-lap Company, (5) Mike DiLillio, (6) John Pilke, d. b. a. P. & B. Mfg. Co., (7) Louis Forte, (8) Goodyear Tire & Rubber Company, Inc., (9) Reuben W. Gurselin Company, (10) Hy-Grade Petroleum Corporation, (11) Logan Co., (12) Joseph J. Kuraschi and Alfred R. Pacini, (13) Manhattan Terrazzo Brass Strip Co., Inc., (14) Mosaic Tile Co., (15) National Cleaning & Tuck Painting Company, Inc., (16) Wesley Norton, (17) Olean Tile Co., (18) Glenn I. Putnam, (19) Rochester Lead Works, Incorporated, (20) Walter B. Shore, (21) Structural Slate Company, (22) Swartout Company, and (23) Windsor Cement Company, Inc. are all dismissed, and an order to that effect may be entered. The petitions of M. N. Cartier & Sons Company, Rochester Lead Works, Incorporated, and Reuben W. Gurselin Company are dismissed on the ground that their claims are included within the claim of Maude A. Johnson, the use plaintiff. All of the other above petitions are dismissed on the ground that there is no evidence in the case warranting their allowance.

In the matter of the intervening petitions of (1) American Builders Supply Company, (2) American Hardware Corporation, Russell & Erwin Division, (3) American Terra Cotta Company, (4) Batavia Lumber & Coal Co., (5) Fred J. Burt, d. b. a. Fred J. Burt Company, (6) R. L. Carter Co., Inc., (7) Casey Carting Corporation, (8) Auguste Chiandoni, John Vitale, Refacle Pranceleni, and Marie Pandelfi, (9) Central Clay Products Co., Inc., (10) Decatur Iron & Steel

Company, (11) Dravo Doyle Company, Dravo Equipment Division, (12) Genesee Lumber & Coal Co., Inc., (13) Genesee Stone Products Corporation, (14) Goldsmith Metal Lath Company, (15) George N. Hudson Corporation, (16) Harvard Tree & Shrub Service, (17) Lackawanna Steel Construction Corporation, (18) Martin New York Tent & Duck Company, Incorporated, (19) McPhillips Manufacturing Company, (20) Patton Clay Manufacturing Company, (21) Flamendon Gabriel Company, (22) Rochester Stationery Co., Inc., (23) Rust Engineering Company, (24) John Schutt, Jr., Inc., (25) Fred Salway, (26) G. A. Swanson, d. b. a. Swanson Stone Co., (27) Toledo Plate & Window Glass Company, (28) United States Gypsum Company, and (29) Maude A. Johnson, d. b. a. Johnson's Roofing & Sheet Metal Works, the use plaintiff, the claims have all been established by sufficient and adequate evidence, in the aggregate amount of $66,881.33. An assignment was received in evidence of each of the foregoing claims to the defendant Maryland Casualty Company. In all except claims numbered (2), (9), (17), (19) and (24) above, stipulations duly executed were filed, authorizing the Maryland Casualty Company to prosecute such claims against the Morley Construction Company. Such a stipulation was unnecessary, because the assignments themselves authorized prosecution by the assignee either in the name of the petitioner or in its own name. As above indicated, the assignee may recover upon these claims against the Morley Construction Company, and the motions for directions of verdict in favor of the assignee must be

granted. In the matter of the petition of the Casey Carting Corporation, a number of claims were involved. The claim was based on a contract with the Morley Construction Company on unit prices for hauling. Involved in that claim was one for a subcontractor Patrick, a subcontractor Turner Resilient Floors, Humphrey Craig, and one Palmieri. There was no evidence introduced to establish those claims, and the claim of the Casey Carting Corporation is allowed only at the sum of $133.75, and an order is directed entered dismissing that claim as to the other above mentioned.

Earl L. Harrington, as administrator of the estate of Moody L. Rupp, deceased, filed an intervening petition claiming $34,455.11 as a materialman. Rupp entered into a contract with the Morley Construction Company on August 5, 1932, whereby he agreed to do and pay for all of the work of excavating, stripping, and grading, and to furnish all labor and material necessary to do all outside concrete work, laying the roads, sidewalks, and so forth, in accordance with the plans and specifications of the contract between the Morley Company and the Government, including all concrete work except steps outside of the buildings, according to subsections 1-C and 34-C of the specifications. Under the contract he was required to do everything necessary pertaining to that work, incidental or otherwise, and to provide at his own expense all equipment, implements and apparatus, as necessary for the due performance of the work. The amount agreed to be paid for this work was $23,275, made up of an item of $8,875 for exca-

vating, grading, and so forth, and $14,400 for concrete work. The amount to be paid was to be subject to additions and deductions as provided in the contract, one of which, contemplated by the contract, was in connection with the concrete work, and it was provided that this work was computed at $4.80 per cubic yard and was subject to an adjustment at completion for a greater or less amount, as might be determined by the actual measurements of the work in place, at that basic price.

Morley agreed to sell to Rupp all of the sand, gravel and cement required for the work under the contract at the site of the buildings for the sum of $3.33 per cubic yard of completed concrete and to supply to Rupp without charge all other materials called for by the plans and specifications for the work, except the forms for the roads and sidewalks. The net contract price, including additions for concrete and deductions for materials furnished by Morley under the contract, was $13,432. Rupp received in cash $10,400. There were undisputed charge-backs of $41.50 for damage done by crane, of $73.60 for tree excavation required under the contract but not done, and of $20 for excavation for flagpole. Deducting the aforesaid cash payments and charge-backs, there would be a balance of $2,995.90 due under the contract.

Claimant admits credits for noncompletion, in addition to the above, aggregating $2,231.32, but defendants claim that this item should be increased to $10,154.90. Claimant also asserts that he is entitled to extras aggregating $13,631.20, and defendants claim that they are

entitled to $5,800 as liquidated damages for failure to perform within the time fixed by the contract, at the rate of $100 per day. The items making up these various claims must be taken up separately. Defendants claimed that there was no substantial performance of the contract. The determination of that claim depends upon the decision as to matters which are to be severally taken up below.

(1) As to rock excavation. It was discovered during the progress of the work that rock excavation not contemplated by the parties to the main contract was required to be done. The Government ordered this work done by written change orders and agreed to pay Morley nine dollars per cubic yard. 298.93 cubic yards of rock were excavated, for which Morley was paid nine dollars per cubic yard. It is conclusively established by the evidence that Rupp did this excavating. Defendants claim that Rupp was required by the terms of his contract to do this work without extra pay therefor. Upon the whole record, that claim cannot be sustained. There can be no question but that this work was an extra and that claimant is entitled to pay therefor. Subsection 10, Paragraph 3(a), of the specifications provides that should rock, within the definition of the specifications, be encountered, it would be paid for as an extra. Rupp's engineer testified that Morley agreed to pay Rupp six dollars per cubic yard for this work, and there is no substantial credible evidence to the contrary. This testimony must be taken as true, although, were it not for such testimony, claimant would be entitled to nine dol-

lars per cubic yard as the reasonable value of the work, being the amount fixed by the contract between the Government and Morley and paid to Morley. This item must be allowed to claimant as an extra, and amounts to $1,433.58. There is no evidence that Morley was to retain any portion of that amount until the completion of the job, and he was entitled to the payment in full for that extra at the time Morley was paid.

(2) Claimant asserts that he is entitled to the sum of $1,072.13, being the reasonable value of services rendered by Rupp in removing debris from different portions of the site between July 18 and July 28, 1933. This debris was ordered removed by Morley and the representative of the Government. There was no agreement between Rupp and Morley as to payment for this work. Rupp did it under protest, claiming that it was not part of his contract to remove this debris, inasmuch as it was accumulated by Morley or other contractors during a period when Rupp was compelled by the Government inspector to stop the laying of concrete and while he was off the job during the cold weather. Before the work was done, there was considerable correspondence between the parties, and much testimony was taken on the question involved. It was apparently conceded that, while Rupp was off the job during the winter months, damage was done by trucking, and so forth, to the parts of the site where sidewalks and roadways were to be completed, and the parties agreed that Rupp should do the regrading necessary to repair this damage for the sum of $200.00. Morley asserted that his understanding of

the allowance of $200.00 was that it was to cover the removal of any debris that had accumulated, while Rupp claimed that that was not so but that the expense of removing such debris, together with the question of who should be required to remove it, was to be left to the representative of the Government for determination. Finally, Morley wrote to Rupp, saying that he would allow an additional fifty dollars for removing the debris. In reply to this letter, Rupp stated that he was going ahead to do the work anyway, but would do it under protest, in the expectation that he would be allowed a reasonable sum for his services in removing such debris. Satisfactory evidence is lacking as to whether the accumulation of debris and damage to the side of the roadways and sidewalks was due to Rupp, or to his failure to properly protect his work against damage, as required by his contract. I am satisfied from the evidence and the concessions of defendants' counsel that $260.00 should be allowed to Rupp as an extra for the regrading and the removal of the debris and that this was payable as soon as the work was done. Connected with this claim there is an attempted charge-back by Morley of $127.00 for replacing pavement. The evidence satisfactorily establishes that the damage to the pavement was not caused by defective work on the part of Rupp but rather by trucks operated by Morley or other contractors, running over the concrete before it was properly cured, and this charge-back cannot be allowed.

(3) Claimant also asserts that he is entitled to recover the sum of $4,675.39, for regrading the site due

to mistake in level, of $3,055.50 for stripping off topsoil preparatory to regrading, and $2,619 for replacing topsoil after the regrading was done, all as extras. Under the contract, Rupp was required to grade the site according to the plans and specifications. The plans were a part of the contract. If the plans were defective, the owner and not the contractor is responsible (*United States* v. *Spearin*, 246 U. S. 132). The Government would not, in this case, be held responsible for any defects in the plans, because of the provisions in the specifications, Section 16, Page 10-1, Paragraph 1 (b), and Section 10, Page 10-11, Paragraph 31 (c), which expressly provide that the Government does not guarantee the accuracy of the plans and that the general contractor must establish and plainly mark the center line of each building before excavating and maintain the center lines and permanently mark their locations, so that information would be at all times available to the contractor and subcontractor in connection with the work. The general contractor was also required to furnish to other contractors all elevations necessary within the building lines needed for the proper installation of the work under separate contracts. If the elevations of floors of the buildings had been established by the general contractor prior to the doing of any excavation or grading by Rupp, the latter might have been enabled to determine the proper elevations in this work. There appears upon the plan which was given to Rupp by the general contractor and which Rupp followed a certain monument on the east lot line of the site in question, marked 8-0. Immediately after Rupp had brought his

machinery on the job, Rupp; his engineer, Reif; Herbert F. Morley, who was in charge of the work for the general contractor; his foreman, Rieman; a man by the name of Sparrow, who was connected with the business of the general contractor, and others met on the site. A discussion occurred as to the point from which levels for grading should be taken, and Morley stated that they had bid for the work on the plans and that they should do the work by the plans. When asked if the monuments shown on the plan existed, Morley personally pointed them out to Rupp and Reif, his engineer and superintendent of construction, in the east lot line of the site. No Government representative was present. The monument at point marked 8-0 was thereupon adopted by Rupp as the bench mark or starting point for grading the large plot in front of the main building's location, as Morley requested that that area be graded first. Its top was substantially flush with the surrounding surface of the earth, and the grade elevation at the top of the monument marked on the plot plan at that point was 910.0. The claimant asserts Rupp relied on Morley pointing out this monument as the proper point from which he could take his levels and proceeded with the grading accordingly. No other bench mark or starting point was pointed out to Rupp at that time or shown anywhere on the plan. On the same plan (exhibit H) were contour lines, and the depth of fills and excavations required was indicated in figures on these lines, but these figures were fixed on the basis of another bench mark or monument as a starting point, not shown on the plans or pointed out in the specifications and unknown to

Rupp, located to the south of the property site. In relation to this bench mark, the elevation of the monument at the point 8-0 was 911.13. Competent engineers of many years experience testified that they had never known of a bench mark being selected or used on building construction which was not shown on the plans. While the grading was in progress, using the monument at 8-0 and grade elevation 910.0, Rupp's engineer learned that the figures on the contour lines did not check with the grading done, but made no effort to learn why there was a discrepancy. The specifications contained a provision that contour lines and figures were not guaranteed. It was not until this grading work had progressed to a considerable extent that the general contractor fixed the floor levels of the buildings from the alleged proper bench mark, mentioned above, which had been established by the City Engineer on a curbstone of one of the City streets outside the property lines, and thus Rupp did not have these levels by which to check. After the grading had all been done on the plot in question, Rupp started, in April, 1933, to lay out the grades for certain of the roads and then first learned that the grading already done was uniformly too high by about 14 inches, according to the floor levels fixed by reference to the City Engineer's bench mark. The Government refused to accept the work, required that the levels be lowered and refused to make any allowance for doing the work. To comply with the Government's requirements, it was necessary to remove the topsoil already placed, regrade the whole plot and replace the topsoil. Morley refused to stand the cost. The work, however, had to be

done before Government approval could be secured. Rupp was required by his contract to proceed with his work and settle disputes later.

It would be impossible to further review in detail the voluminous testimony taken in connection with the questions of responsibility for the mistake and liability for the expense of regrading, within the limits of this decision. It has all been carefully read and considered. The weight of the credible evidence indicates that the necessity for regrading was due to Morley's mistake in fixing the monument at station 8-0, for which the incorrect elevation of 910.0 was shown on the plan, as the base point from which grading was to be done; that Rupp had a right to rely upon that point so fixed by Morley as the correct point and as indicated on the plans furnished him, in the absence of information to the contrary, and to proceed accordingly; that he was not guilty of negligence in failing to take steps to determine any other starting point after Morley had fixed that point and the plans showed it; and that he was not required to regrade at his own expense. He is entitled to recover from defendants the fair and reasonable value of the work so required to be done by the Government to comply with the contract, which I find, upon the evidence of Reif and Straley, who substantially agree, to be $10,360.29. This sum was due from Morley prior to the time Rupp quit the job.

(4) Defendants are not entitled to recover anything by way of liquidated damages for delay in performance on the part of Rupp or for failure to com-

plete his contract within the time limit. Judge Knight struck out, on motion, their counterclaim and offset for delay, and by that decision we are here bound. By the terms of the subcontract, Rupp was required to complete the work within 240 days from the date of the contract. Thereafter the Government extended the time of completion of the general contract 65 days, and Rupp and Morley agreed that the former should have the benefit of this additional time. This made the time for completion 305 days. This expired on July 19, 1933. Rupp did not complete the contract prior to July 19, 1933. Claimant's position is that he was excused from completion because of Morley's fault, either in his failure to make payments to Rupp when due or on account of other matters. The evidence sustains his position, and it must be held that Rupp met the burden of proof required of him to show substantial performance in so far as the time limit for completion was concerned.

(5) As to hand raking. Rupp was required to hand-rake the surface after the grading had been completed. He did not do this work. Defendants claim that the reasonable cost of doing this work, which was done by Morley after Rupp quit, was $4,331.47, while claimant's evidence tends to show that its reasonable cost was $1,931.32. Defendants' figures were based on what they asserted was the actual cost as shown by the pay rolls between October 3, 1933, and October 31, 1933, aggregating $3,382.74, plus insurance of $470.31, making a total cost of $3,862.13. This is the

only competent and convincing evidence on the subject. There is evidence that Morley made an effort to get others to finish the contract without success, and was compelled to do this work himself. That amount should be allowed for the work.

(6) As to items claimed for hand excavation. Defendants claim they should be allowed (1) $5,156.22 for hand excavation for piers and trenches, (2) $243.12 for excavation of catch basins, and (3) $252.99 for excavation for culverts and sewers on the ground that such work was covered by the subcontract. Evidence as to this was admitted on the question of substantial performance, the work having been done by Morley on Rupp's refusal to do it. Claimant asserts that Rupp had an oral agreement prior to the execution of the contract that he would do no hand excavation, or, in other words, that any excavation required would be done only by machine. If such an agreement was made, it was merged in the written contract. But claimant says that the written contract was modified orally to the same effect. When the question of hand excavation again came up for discussion, Rupp was excavating by machine and doing all the excavation, as he claimed, that the contract called for, and he claimed that what he did took the place of all hand excavation deemed necessary by Morley. When called upon by Morley to do hand excavation, in addition to the machine excavation already done, Rupp did the work. On May 27, 1933, Rupp wrote Morley, "In our original understanding with you, our excavating work would be strictly of a machine nature. Mr. John Reif,

Reuben Rupp and myself were present at the Hotel Statler when this was agreed upon. We have lived up to the letter of this agreement and therefore I do not see how you can expect me to carry on any hand operations. If you will recall the time when you were working on the building foundations certain footings were excavated by hand by your men, so I do not see why it should crop up again." Morley not only failed to reply to this letter, but took no issue with Rupp as to the understanding, and subsequently paid Rupp for work done both before and after the date of the letter. The work was all done prior to December, 1932. On the December 1st statement made to Rupp no mention was made by Morley of any item for hand excavation coming to him, nor was it ever mentioned by Morley in any subsequent statement or letter or by word of mouth. There is much other evidence on the subject. It all leads to the conclusion that Morley acquiesced in the alleged modification of the contract and that Rupp was not required to do any hand excavation.

A different question arises concerning the other items. Claimant admits that Rupp omitted to do certain excavation for catch basins, culverts and sewers required by the contract. He claims that such omission amounted to $100.00, which he is willing to allow, while defendants claim that it cost Morley $500.00 to do this work. Morley's books, kept in regular order, show pay roll expenses for this work from May 30, 1933, to July 25, 1933, plus compensation insurance, of $498.11. I think, upon the whole case, the evidence shows that the reasonable value

of the work necessarily done by Morley in connection with this excavation work was $498.11 and should be allowed.

(7) The claimant asserts that he is entitled to the sum of $575.60 (Exhibit WW) for extra materials, labor, and rent of crane between September 1, 1932, and November 4, 1932, inclusive. Morley claims that all of the items entering into this total arise out of work required to be done by Rupp under the terms of the contract. There is no dispute that Rupp did the work specified, furnished the materials and furnished his crane for use in the work, or as to the correctness of the items making up the total. Considerable of this work was in connection with the excavation which it was alleged Rupp was required to do under the contract, but which it is found was not required of him, where it was referred to as hand excavations around the footings. Extensive detailed testimony was taken on this item, and the evidence as a whole satisfactorily establishes that this work and the material and the use of the crane were not required by the terms of the contract and must be deemed an extra to which Rupp is entitled.

Summarizing the above in connection with the claim of Harrington as administrator, the account between the parties actually stood as follows at the time Rupp quit the job:

Contract price	$23,275.00
Additions for cement	480.00
	23,755.00

Extras		
(1) Rock Excavation	$1,433.58	
(7) Miscellaneous extras	575.60	
(2) Removing debris	260.00	
(3) Regrading	10,350.00	12,619.47
		36,574.47
Paid by Morley in cash	10,400.00	
Cement furnished	10,323.00	20,723.00
		15,651.47
Deductions		
(6) Hand raking, net	3,862.13	
Damage by crane	41.50	
Tree excavation	75.60	
Excavation for flagpole	20.00	
(6) Excavation for catch basins, etc.	498.11	4,495.34
Balance due Rupp		11,156.13

The question now arises as to whether claimant has met the burden of proof cast upon him of showing substantial performance of the contract. Otherwise he cannot recover anything. According to a statement made by Morley to Rupp (Exhibit 14) as of August 1, 1933, there was an overpayment to Rupp of $241.78, taking into consideration a deduction of 15% as provided for in the contract between Morley and the Government. If the 15% is not taken into account, Morley conceded that there was due Rupp $1,627.37. Nevertheless, the statement is inaccurate, because there had been no complete statement of adjustments of debits and credits on account of extras, and so forth. On the basis of the above statement and

ignoring the 15% item which Morley was entitled to withhold until final settlement, there was due Rupp at that time $15,018.26, or, with the 15% deducted, $12,665.52, and there remained to be done on the contract the hand raking, aggregating $3,862.15. This was approximately 10% of the contract price. The last payment made to Rupp by Morley was on or about August 17, 1933, on a statement made through Rupp's attorney on August 16, 1933, in which he claimed the balance due of $4,328.67, plus the amount properly due for regrading, and no payments were made by the Maryland Casualty Company to Rupp at any time. Notwithstanding that, Rupp continued in the performance of his contract until sometime in September, 1933. The evidence clearly establishes that Morely put a gang to work about October 3, 1933, on the hand raking job, and, according to the testimony of one witness, Rupp removed from the site certain dump trucks and a steam shovel on October 3, 1933. There was clearly no work actually done by Rupp after September 26, 1933, and he died October 15, 1933.

The petitioner alleges that he fully performed the contract, with the exception of the hand raking, which he claimed he was not required to do, but if he was required to do the hand raking under the contract he quit because Morley failed to pay him the amount due. His continuance on the work after August 16, 1933, is explained in the same letter in which he made the demand for payment, where he says that in accordance with the terms of the contract, if the balance due is not paid within three days, of the full amount due to Mr. Rupp under the contract, $2,107.54, which remains unpaid, it will be neces-

sary for him to quit work on the job and sue for damages for breach of contract. In that letter he refers to a notice of default which Morley delivered to Rupp under date of August 15, 1933, and says: "Permit us to state that Mr. Rupp has at all times kept a sufficiency of properly skilled workmen to prosecute their work in accordance with the terms of his contract with you. They are still on the job and he intends to keep them there until the job is completed, provided you make payments in accordance with the terms of your contract. Mr. Rupp does not waive your breach by waiting three days and permitting you to get yourself out of default, but intends to avail himself of your default, if payment is not made as above set forth." There is no evidence to sustain a claim that Rupp terminated the contract or rescinded it, but the evidence is substantial and sufficient to establish that Rupp finally quit because of the failure of Morley to make payments as he was required to do under the terms of his contract. The arbitration clause of the contract is not to be invoked where the reason for failure to further perform the contract was the failure of the contractor to pay for services done and material previously furnished.

It is clear that he cannot recover for any sum in this case, because there was neither complete nor substantial performance of his contract (*Spence* v. *Hem*, 163 N. Y. 220; *Nieman-Irving & Co.* v. *Lazenby*, 263 N. Y. 91; *Bush* v. *Jones*, 144 Fed. 948; *Turner* v. *Henning*, 262 Fed. 637), unless defendant's breach exonerated Rupp from further performance after August 16, 1933. Even then, the extent of the damages and omissions, including the cost of correction of defects, must be set off against the amount

coming to the claimant (*Nieman-Irving & Co.* v. *Lazenby, supra*). There was no willful failure to perform or intentional departure from the terms of the contract with reference to performance on the part of Rupp. The sole ground for refusing to further perform, on the evidence in this case, was the failure of the contractor to pay installments due. Under the authorities it seems that Rupp was justified in refusing to further perform (*United States Fidelity & Guaranty Co.* v. *Robert Grace Contracting Co.*, 263 Fed. 283; *Guerini Stone Company* v. *Carlin Construction Company*, 248 U. S. 334, 344).

Judgment must therefore be directed in favor of the various claimants and against the defendants as herein indicated. Interest must also be allowed from November 13, 1933, the date of final settlement (*Robinson* v. *United States*, 251 Fed. 461, appeal dismissed 257 U. S. 664). On the question of costs, the use plaintiff and each intervening petitioner who is successful herein is entitled to a single docket fee, plus costs and disbursements as allowable in this court on trial of a jury case (*Title Guaranty & Trust Company* v. *Crane Company*, 219 U. S. 24; 28 U. S. C. A. 572; *Ex parte Peterson*, 253 U. S. 300). Where several claimants have joined in the same petition, but one docket fee is allowable, unless the clerk received payment, under some provision of law, of an additional docket fee. The clerk is directed to tax costs herein accordingly.

Dated December 14, 1936.

(Signed) HARLAN W. RIPPEY,
United States District Judge.

FILE COPY

FEB 24 1937

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 325.

OCTOBER TERM, 1936.

MORLEY CONSTRUCTION COMPANY AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, RESPONDENT.

MOTION FOR REHEARING AS TO THE MERITS AND FOR FINAL DISPOSITION OF CAUSE.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioners.

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Supreme Court of the United States

No. 325.

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MORLEY CONSTRUCTION COMPANY AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, RESPONDENT.

MOTION FOR REHEARING AS TO THE MERITS AND FOR FINAL DISPOSITION OF CAUSE.

Now come petitioners and respectfully pray this Honorable Court grant a rehearing on the merits and to modify its judgment herein by deciding this cause on its merits for the following reasons, to-wit:

Because this case was begun in the District Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, on the 27th day of November, 1933; that as a result thereof and of the decree of the trial court herein all assets of petitioner,

Morley Construction Company, have been in effect sequestered so that it is unable to pay its creditors or collect from its debtors; that after the decision herein by this court on the first day of February, 1937, the respondent, Maryland Casualty Company, filed a motion in the office of the clerk of the United States Circuit Court of Appeals which motion is in words and figures as follows:

In the United States Circuit Court of Appeals for the Eighth Circuit. Morley Construction Company, a Corporation, and Merchants Bank of Kansas City, Missouri, a Corporation, Appellants, vs. Maryland Casualty Company, a Corporation, Appellee. No. 10477.

Motion to Set Down for Reargument.

Now comes appellee, Maryland Casualty Company, and respectfully prays the court to set down the above-entitled cause for oral argument at such time and place as to the court may seem advisable.

SPENCER F. HARRIS,
PAUL G. KOONTZ,
Attorneys for Appellee.

Received copy hereof this 4th day of February, 1937.
MARTIN J. O'DONNELL,

Attorneys for Appellants.

And at the same time wrote a letter to Judge Booth, the judge of the said Circuit Court of Appeals for the Eighth Circuit, who delivered the opinion in the said cause, which letter is in words and figures as follows:

Law Offices of
HARRIS & KOONTZ
515 Commerce Building
Kansas City, Mo.

February 4, 1937.

Spencer F. Harris
Paul G. Koontz
Harry F. Murphy
Wayne Hemphill

Telephone
Harrison 4602

Judge Wilber F. Booth
United States Circuit Court of Appeals
Eighth Circuit
St. Paul, Minnesota

Dear Judge Booth:

We have received a copy of the opinion rendered by the Supreme Court in the case of Morley Construction Company, *et al*, vs. Maryland Casualty Company, *et al*, on certiorari from the United States Circuit Court of Appeals (No. 10477), a copy of which opinion we are enclosing herewith.

From this opinion it appears that the Supreme Court has reversed the decision of the Court of Appeals and has remanded the cause to the Court of Appeals for the purpose only of determining whether or not a decree of exoneration granted by the District Court was proper under the circumstances.

We feel that we would like to reargue this case, addressing our argument solely to the question of exoneration, and we accordingly have prepared a motion to have the case set down for reargument on that one point, a copy of which motion we are enclosing herewith. We are making this request because we feel that it was the opinion of the Court of Appeals that appellee was entitled to relief and that inasmuch as the Supreme Court has foreclosed the question of specific performance, we should be per-

mitted to again present orally the question of exoneration.

Very truly yours,

HARRIS & KOONTZ

By SPENCER F. HARRIS

SFH:PW

CC-Mr. Martin J. O'Donnell

That, thereafter, the counsel for petitioners received a letter from the clerk of the United States Circuit Court of Appeals in words and figures as follows:

UNITED STATES CIRCUIT COURT OF APPEALS
Eighth Circuit

E. E. Koch, Clerk
10477

St. Louis, Mo.,
February 4, 1937.

Messrs. Buchholz & O'Donnell,
1657 Dierks Building,
Kansas City, Mo.

Dear Sirs:

I notice in the newspaper reports that the case of Morley Construction Company v. Maryland Casualty Company, No. 10477, was remanded by the Supreme Court to this Court for further proceedings, and I am short of copies of the printed record. If you have or can obtain any copies of the record as printed for use in this Court kindly send same to this office as copies will no doubt be necessary for a probable resubmission to this Court.

Yours truly,

E. E. Koch
Clerk.

Weh.

That it is evident that respondent desires and the clerk of the circuit court of appeals seems to think that the cause must be set down for a reargument at the next term of said court of appeals after the receipt by the clerk of said court of appeals of the mandate of this court in said cause; that if the judgment and opinion herein be not modified by disposing of the case on the merits, then it may be necessary to have the record reprinted in the United States Circuit Court of Appeals and the cause reargued; that the said cause may not be finally determined within a year from this date in the said circuit court of appeals and it may be that another application for certiorari to this court may be filed to review the next decision of the said circuit court of appeals in this cause; that if the case be remanded without a decision on the merits by this court then due to the delay a great hardship will result to the petitioner, Morley Construction Company, and its creditors who are entitled to be paid without further delay.

That this motion is filed so that this cause may be here disposed of in accordance with the principles stated in *Re Boston & M. R. Co.* v. *Gokey,* 210 U. S. 155, 52 Law Ed. 1002, this court said:

> "As a certiorari was issued in this case, it is now before us on the return to that writ, and we have power to render such judgment as the circuit court of appeals should have rendered, or we might reverse the judgment of affirmance by that court, and send the case back to it to decide the question of jurisdiction, which it had refused to pass upon.

We think it would be an unnecessary hardship to the plaintiff to do the latter, because of the further delay that would thereby be caused. The accident occurred in 1901, and the trial resulted in a very moderate verdict, considering the injury, and at this time, nearly seven years after the injury, the plaintiff has not yet been paid the amount of his judgment."

The opinion of the court of appeals in so far as it discusses the subject of exoneration demonstrates that that relief was erroneously granted in this cause by the trial court and that the decree granting same should be reversed. Both parties have briefed this case in this court on the merits and especially on the subject. A further delay will work an extraordinary hardship on all parties and the fact that the respondent desires to have the cause reset for argument doubtless necessitates a new printing of the record in the circuit court of appeals and new briefs and may result in the further delay of another year. The suit in the court below will soon be four years pending and the money of the construction company is held by the Treasurer of the United States without interest. We respectfully submit that if a motion for hearing were granted herein the cause could be resubmitted on briefs without additional argument and the judgment of the district court reversed without all the unnecessary hardship, expense and delay incident to returning the case for consideration on the merits to the United States Circuit Court of Appeals. We, therefore, very respectfully submit that this Honorable Court sustain this motion and modify its opinion or judgment by deciding the case on the merits

and reversing the decree of the district court so that the case may be finally terminated.

Wherefore, petitioners respectfully pray this Honorable Court, either to grant a rehearing of this cause on the merits so that it may be presented on the merits or that the court will examine the briefs on the merits which have been filed in this court and cause and particularly to examine the opinion of the circuit court of appeals on the question of exoneration and the brief of appellant from page 60 to the end thereof, on that subject, and if it can dispose of the case without a reargument to decide the said cause on its merits and render a final decision disposing of all the issues in said cause.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioners.

We hereby certify that the above motion is presented in good faith and not for delay but to prevent delay.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 325.—October Term, 1936.

Morley Construction Company and Merchants Bank of Kansas City, Missouri, Petitioners, *vs.* Maryland Casualty Company, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 1, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

The power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal is here to be admeasured.

Morley Construction Company, a petitioner in this court, made a contract with the United States, acting by the Veterans' Administration Department for the construction of a veterans' hospital at Batavia, New York. In conformity with statute (40 U. S. C. § 270) it gave a bond for the completion of the contract and for the payment of all bills for material and labor, the respondent Maryland Casualty Company signing the bond as surety. During the progress of the work, the contractor found itself in need of a loan of money to enable it to go on. Accordingly a supplementary agreement was made between the contractor and the surety to relieve the situation. By that agreement, dated April 28, 1933, the contractor agreed to deposit in a designated trust company in Buffalo $5,000 to be used in the performance of the work and to deposit in the same account for the same purpose all moneys received from the United States as payments upon the contract. The surety agreed to deposit in the same account $5,000 as a loan to be secured by the contractor's note, and additional moneys sufficient to pay the present and future bills of plasterers, amounting, as the evidence shows, to $5,700. The contractor and the surety were to have joint con-

trol of the account, and no moneys were to be withdrawn therefrom without the approval of the surety by designated represenatives, the approval to be indicated upon the check or draft in writing.

Following this supplementary agreement, the contractor went on with the work, and brought it to completion. The surety made the first payment of $5,000 in accordance with its promise but refused to pay the $5,700 owing to the plasterers. In the meantime a series of payments became owing from the Government upon estimates of value in advance of completion and acceptance. Warrants for these payments were forwarded by the Government to the trust company in Buffalo to be placed in the joint account, notice having been given by the contractor to issue them accordingly. However, a different course was followed when the final payment became due. Apparently through inadvertence, the Government sent a warrant for that payment ($59,780.82) to the contractor itself at its office in Kansas City, Missouri. The contractor endorsed the warrant, delivered it to the Merchants Bank of Kansas City, one of the petitioners in this court, and directed the bank to issue a cashier's check for a like amount to the order of the contractor's president. The bank made out the check, but held it to await the payment of the warrant, which it deposited in a Federal Reserve Bank to be forwarded, in the usual course of collection, to the Treasury at Washington. Neither check nor warrant has been paid as a consequence of an injunction obtained by the respondent.

Upon learning from the Veterans' Administration Department of the transmission of the warrant, the surety began two suits, one in the District of Columbia, where the payment of the warrant was stayed by an injunction, the other the suit at bar. It recounts in its complaint the facts or most of them already stated in this opinion, adding thereto that outstanding bills for more than $100,000 are covered by its bond. It says that it is entitled to the specific performance of the supplementary agreement and to a decree depositing the warrant in the trust company at Buffalo to be applied upon the joint account. It says also that by reason of the unpaid bills of materialmen and laborers there is a duty on the part of the contractor to exonerate the surety from loss or liability and to apply the warrant to that purpose. Finally, it makes claim to a right of subrogation to the position of the contractor over

against the Government, a claim which apparently has been abandoned and will not engage us further. The bill of complaint ends with a prayer for relief appropriate to the several theories of liability put forward by the pleader, the theory of specific performance, the theory of exoneration, and the theory of subrogation. To render the relief effectual, the bank in Kansas City was joined as a defendant.

The District Judge held that the surety was not entitled to the specific performance of the agreement, having failed to pay the plasterers and being therefore in default itself. He held, however, that apart from any agreement the contractor was subject to a duty to exonerate the surety from present liabilities. True, there was no purpose on the part of the contractor to divert the proceeds of the warrant from the uses of the contract. As to this the finding is explicit. Even so, a cause of action for exoneration does not include among its elements the presence of a wrongful purpose. *Glades County* v. *Detroit Fidelity Co.*, 57 F. (2d) 449; *West Huntsville Cotton Mills* v. *Alter*, 104 Ala. 305; *Pavarini* v. *Title Guaranty & Surety Co.*, 36 App. D. C. 348; *Hutchinson Grocer Co.* v. *Brand*, 79 Kan. 340. The decree conforms to the findings in its distribution of relief. It adjudges the complainant to be entitled to exoneration but not to specific performance. The proceeds of the warrant are to be placed in a bank to be chosen by the contractor, the deposit to be "designated as a special trust fund for the payment of bills for labor and material used on the United States Veterans Hospital in Batavia, New York." No provision is made that the surety, or indeed any one other than the contractor, shall have any control thereof.

From that decree the contractor appealed to the Circuit Court of Appeals for the eighth circuit. There was no cross-appeal by the surety. The Court of Appeals states in its opinion, "We are in grave doubt whether exoneration can properly be granted." Preferring by reason of that doubt to put its decision on some other ground, it concludes that there should be specific performance of the supplementary agreement. It concedes that the surety is in default for failing to live up to the agreement strictly, but it finds that the default was not unconscionable or fraudulent, and that a court of equity in its discretion may overlook an unsubstantial wrong. Recognizing the necessity of modifying the decree if

exoneration is to be exchanged for specific performance, the opinion states that "an injunction against using the moneys except as agreed upon, and an order to place said moneys when received in the joint account and disburse the same in payment of just claims for labor or materials, would meet the requirements and rights of plaintiff and would not be impossible of performance" and that "a decree along such lines should be granted by the trial court." 84 F. (2d) 522, 526. Accordingly, the mandate of the appellate court provides that the cause be remanded to the District Court with directions to modify its decree in accordance with the views expressed in the opinion. We granted certiorari to fix the measure of relief available to a non-appealing suitor.

The substitution of specific performance for exoneration at the instance of the surety was not an affirmance of the decree below, as if the reasons only had been changed with the decision standing firm. Alike in substance and in form there was a modification of the decree itself, the facts being found anew and differently, the law declared anew and differently, and the relief remodeled and adapted to the new law and the new facts. Without a cross-appeal, an appellee may "urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435. What he may not do in the absence of a cross-appeal is to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *Ibid.* The rule is inveterate and certain. *Canter* v. *American and Ocean Insurance Companies*, 3 Pet. 307, 318; *Chittenden* v. *Brewster*, 2 Wall. 191, 196, *The Maria Martin*, 12 Wall. 31, 40, 41; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 621; *Landram* v. *Jordan*, 203 U. S. 56, 62; *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 111; *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528, 536; *Langnes* v. *Green*, 282 U. S. 531, 538; *Alexander* v. *Cosden Co.*, 290 U. S. 484, 487. Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees, at all

events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment. There is no need at this time to fix the limits of the rule more sharply. "Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken." *The Maria Martin, supra.**

The surety laid claim to relief upon the basis of a contract, and to other relief by force of an equitable doctrine independent of contract. The decree of the District Court rejected the first claim because the contract had been broken, and accepted the second because the breach was then irrelevant. The decree was responsive to the claim that had been accepted, and not to any other. If there was to be specific performance of the contract, the surety, together with the contractor, would control the distribution of the fund, for so the parties had agreed. If there was to be exoneration and nothing more, the contractor or perhaps the court would control the application and the surety would stand aside. *Stulz-Sickles Co.* v. *Fredburn Construction Corporation,* 104 N. J. Eq. 475, 478, cf. *Glades County* v. *Detroit Fidelity Co.,* supra; *Arant, Suretyship,* pp. 318, 319 and cases cited. Exoneration "does not entitle the surety to custody or control of the fund." *Stulz-Sickles Co.* v. *Fredburn Construction Corporation,* supra. The decision of the Court of Appeals puts an end to this nice adjustment of the relief to the law and of the law to the facts as found. A decree appropriate to exoneration is annulled, and one appropriate to specific performance is given in its place. This is to find the facts anew and differently, for the trial judge had held, at least by implication, that the breach by the surety, viewed in the light of all the circumstances, was something more than unsubstantial. It is to find the law anew and differently, for the trial judge had held that a

* State decisions on the question of the review of findings at the instance of an appellee who has not taken a cross-appeal exhibit a wide variance of procedure. For cases of the stricter type, see Turner *v.* East Side Canal Co., 168 Cal. 103, 108; Clark *v.* Corser, 154 Minn. 508; Cox *v.* Stokes, 156 N. Y. 491; Werdebach's Estate, 280 Pa. 26. With these contrast the following: Bullman *v.* Cooper, 362 Ill. 469; Wyatt *v.* Town of Manning, 217 Ia. 929; Oppenheimer *v.* Bank, 97 Tenn. 19; Huntington *v.* Love, 56 Wash. 674.

surety chargeable with such a breach was not entitled to a decree upon the footing of the contract. Even more important, it is to give a new measure of relief, for the trial judge had ruled that the fund was not to be held upon the restrictions stated in the contract, but upon different restrictions originating in the conscience of the Chancellor. True, the relief proper to the theory accepted at the trial is almost as favorable from the view-point of the protection of the surety as the one adopted on appeal, though distinctly less burdensome from the view-point of the principal. Exoneration is not the same as specific performance, but it is not very different, and may be nearly, if not quite, as good. This is surely not a reason why an appellate court should be at liberty to treat the two as interchangeable. One might as well say that at the instance of a non-appealing plaintiff a judgment for specific performance could be made to take the place of one for the recovery of damages.

The decree should be reversed and the cause remanded to the Court of Appeals to pass upon the question, not yet definitively answered, whether relief in the form of a decree for exoneration is proper in the circumstances, and for other proceedings in accord with this opinion.

Ordered accordingly.

A true copy.

Test:

Clerk, Supreme Court, U. S.